Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

STRUCTURAL FIBERS, INC. and
ESSEF CORPORATION,
Petitioner,

v.

JAMES KULCH,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF OHIO

PETITION FOR WRIT OF CERTIORARI

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282 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the existence of a state retaliatory discharge cause of action based solely on filing Occupational Safety & Health Act complaints presents a conflict with the purposes and objectives of the Act so as to be preempted, and if not:
   a. Whether a state employment tort cause of action based on violation of the Occupational Safety and Health Act, Section 11(c), enlarges or affects state law in any other manner that is prohibited by Section 4(b)(4) of the Act, 29 U.S.C. §653(b)(4).
   b. Whether interpreting a state statute to include filing a complaint under the Occupational Safety and Health Act enlarges or affects state law in any other manner that is prohibited by Section 4(b)(4) of the Act, 29 U.S.C. §653(b)(4).
   c. Whether a state employment tort cause of action based upon violation of a state statute that protects filing Occupational Safety & Health Act complaints enlarges or affects state law in any other manner that is prohibited by Section 4(b)(4) of the Act, 29 U.S.C. §653(b)(4).
2. Whether statutory neutrality of the Occupational Safety and Health Act, 29 U.S.C. §653(b)(4), precludes the states from incorporating a violation of the Act into their law of employment torts through judicial decision, and in the absence of federally approved legislation under 29 U.S.C. §667(b).

PARTIES TO THE PROCEEDING

James Kulch, Respondent and Plaintiff-Appellant below, is an individual resident of Geauga County of Ohio and formerly employed by Petitioner.

Petitioner, Defendant-Appellee below, Structural Fibers, Inc. is a former name of Essef Corporation which is also a named defendant. Essef Corporation is headquartered in Geauga County, Ohio where it has maintained an unincorporated operating division known as "Structural Fibers" where Respondent was employed. The current name of the division is "Structural NA." No subsidiary corporation is a party.

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JURISDICTION

This Petition for Writ of *Certiorari* seeks the discretionary review of the decision of the Ohio Supreme Court in *Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d 134 (Ohio 1997), opinion and judgment entry dated April 16, 1997 which was subject to a Motion for Reconsideration and Rehearing filed on April 26, 1997 and denied by the Ohio Supreme Court on June 18, 1997. Both are reproduced in Petitioner's Appendix at Appendix A and C. References to the decision on the merits herein will be to the official report.

Statutory basis for review by *certiorari* being sought hereunder is 28 U.S.C.S. 1257(a), 28 U.S.C.S. 2101(2). This jurisdiction if further elaborated in the Rules of the Supreme Court of United States, Part III, Rules 10, 12, 13, and 14.

STATEMENT OF FACTS

Structural Fibers terminated the employment of James Kulch, an hourly factory worker, in October 1991 because of videotaped dishonesty[1]. The videotaping was the culmination of an investigation initiated by another hourly factory co-worker who had informed on him. Mr. Kulch, nine months earlier, unknown to the employer, had filed a complaint with the Occupational Safety and Health Administration (OSHA) concerning the air borne chemicals in an area of the plant where he was to be trained. OSHA had investigated and, although it did issue a citation for certain other minor items discovered on inspection which were settled by the employer, OSHA found no violation of the air borne chemical standard.

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[1] Petitioner understands Respondent will be featured by ABC Nightline in the Winter 1997-1998 season.

Afterwards during the next six months, Mr. Kulch proceeded to publicly take credit for filing the OSHA complaint. He also presented continual resistance to legitimate regulation of his work by his employer. As a result, he misinterpreted certain events from his surroundings as being retaliatory on account of his filing the OSHA complaint rather than because of the objective factual circumstances caused by him. His two retaliation complaints to the Department of Labor (DOL) under OSHA Section 11(c), including the one as to his discharge, were investigated, dismissed by the DOL and not appealed by him.

Two months after his employment termination, Mr. Kulch suffered a second heart attack.[2] He then filed the instant lawsuit based upon the Ohio whistleblower statute, R.C. 4113.52, and upon the Ohio common law doctrine of public policy discharge tort, otherwise known as tortious or retaliatory discharge in other jurisdictions[3].

Description of Proceedings Below

The Ohio Supreme Court, in *Kulch v. Structural Fibers, Inc.*, 78 Ohio St. 3d, 134 (Ohio 1997) declared that OSHA, particularly Section 11(c), 29 U.S.C. §660(c), could serve as a basis for the public policy tort independent of any state statute, *Id.* at 151. Secondly, the court remanded the interpretation of the state whistleblower statute to the trial court for decision on whether OSHA could be read into the state statute as a state environmental law and thus also support

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[2] The first was in 1990, prior to all events relating to this case.

[3] The case was removed to the U.S. District Court for the Northern District of Ohio based on ERISA and was remanded to State Court when Mr. Kulch disavowed an ERISA theory of liability. Appendix N.

a tortious discharge claim based on the state statutory violation. *Id.* at 148 and 161.

Mr. Kulch's statutory theory was, as an OSHA complainant, that he was protected from retaliation under the Ohio whistleblower's statute and that he had been discharged in contravention of its terms. Those terms are referred to as Division A(1), which requires prior oral and written notification to the employer before filing with an agency, and Division (A)(2) which does not require advance notice to the employer in case of certain environmental laws. Division A(2) obviously does not relate to OSHA filings. It was undisputed that Mr. Kulch did not comply with all the advance notice requirements of Division A(1). Therefore, from the trial court through the Ohio Supreme Court, this statutory claim on Division A(1) was rejected.

The common law theory for the employment tort, when this case originated, was new to Ohio and has been developing in the case law during the pendency of this case. Mr. Kulch's initial complaint simply added the public policy tort theory as a means to supplement the statutory remedies with common law tort remedies.

The trial court disposed of this case on the employer's summary judgment motion because the employee did not comply with the prerequisites to protection under the whistleblower statute and further that the state whistleblower statute precluded a state common law remedy of any type. Specifically, the trial court found that plaintiff's only report was to OSHA and assumed for purposes of its decision that such was the employer's motive in discharge. Appendix M.

Mr. Kulch appealed to the Eleventh Appellate District, Geauga County, Ohio, raising the issues of whether a public policy tort under common law could be based on violation of state whistleblower law. He did not assert OSHA as an independent basis for the tort. He argued that the OSHA filing was one of the elements of the state whistleblower claim

and thus indirectly supported the state tort claim which was based on the state statute. Appendix L. In addition, to defending the decision of the court below, the employer argued to the appeals court that the state whistleblower statute did not pertain to non-criminal OSHA complaints relating to safety standards but only to criminal offenses and none of the OSHA criminal offenses were cited. Appendix M. Secondly, it argued that the Ohio common law cause of action was created only for violation by an employer of a specific statute which in itself did not provide a remedy for employees. The Ohio whistleblower statute did provide such a remedy for employees so there was no legal basis for a common law tort claim independent of the statutory remedy.

Mr. Kulch's second assignment of error to the Court of Appeals was that Division A(2) of the whistleblower statute dispenses with any notice for complaints of violation of R.C. Chapters 3704 and 3734, two of the environmental laws listed in Division A(2). Appendix L. He did not refer to OSHA in his Division A(2) assignment of error.

Mr. Kulch, at all times, claimed, as the trial court found, that his sole whistleblower activity was the filing of an OSHA complaint and that he never made any complaint to any other public body, state or federal, relating to environmental protection. Therefore, the employer argued that the sole public filing was with OSHA, which is not an agency under Chapters 3704 or 3734. Secondly, with respect to Division A(2), the employer thoroughly briefed the distinctions between the state environmental laws and OSHA Appendix K (Appellee's Brief, pp. 29-35).

The Court of Appeals affirmed the trial court with respect to Division A(1). The Court of Appeals found that the Division A(2) theory was not raised below "accordingly this court will not address Appellate's argument that no notice to the employer is required for complaints regarding R.C. Chapters 3704 and 3734." (Appendix J at p. 8) As to the

employment tort, the Court of Appeals followed the prevailing state law at the time that the existence of a statutory remedy precluded a common law tort claim.

The Ohio Supreme Court selected this case for review primarily on the issue of whether a state statute having a remedy created by the legislature would support the tortious discharge cause of action at common law or whether the legislation precluded the common law remedy[4]. It was clear that the Division A(1) requirements were not factually satisfied. *Kulch* at 148. The Court needed to either dismiss the appeal or consider whether some alternative would support the tort claim. Ultimately, it chose to find that OSHA was an independent source of state public policy that could directly support a tortious discharge cause of action. *Kulch* Syllabus 1. It thereby allowed OSHA to enlarge, diminish or affect state tort law in any other manner. For good measure, the Ohio Supreme Court also looked to the Ohio statute's Division A(2) and crafted a basis to consider whether OSHA could indirectly support the employment tort. In that regard, the Court remanded the interpretation of Division A(2) for the purpose of determining whether an OSHA filing could satisfy the Ohio statute in protecting whistleblowers who report state environmental crimes to an appropriate agency. If so, an Ohio statutory claim would be made and thereby an Ohio common law employment tort. *Kulch* at 154.

In the proposition of law asserted to the Supreme Court on the employment tort, Mr. Kulch did not make reference to Division A(2) but argued that the state

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[4] This is apparent from the stay order (Appendix G) referring to *Hayes v. Zoological Society of Cincinnati*, 73 Ohio St. 3d 254, 652 N.L. 2d 948 (Ohio 1995) which was dismissed as improvidently accepted for review on this issue.

whistleblowers statute in toto does not preempt the common law public policy tort claim. Appendix F. In his brief he said the statutes other than the state whistleblower statute, such as 29 U.S.C. §660(c), Section 11(c) of OSHA, could serve as the independent public policy basis for the retaliation tort[5]. With respect to Division A(2), he urged that summary judgment could not have been granted on that division.

With respect to a tort claim based on the state statute, the Court instructed that the employee must fully comply with its terms. See, e.g., *Kulch* at 154. (...assuming that appellant complied [with Division A(2)]) and ("Thus to the extent that he complied with R.C. 4113.52(A)(2)...") The Ohio Supreme Court refused to address the merits of Mr. Kulch's contentions that he complied with Division A(2) allowing them to be raised on remand and concluded:

> "We vacate that portion of the trial judgment which dismissed Appellant's claims for protection under R.C. 4113.52(A)(2), reinstate Appellant's statutory claim that he was unlawfully retaliated against by employers for having and filed an authorized report under R.C. 4113.52(A)(2), and remand this case to the trial court for further proceedings on the statutory cause of action."
> *Id.* at 148.

The Ohio Supreme Court's recitation of Mr. Kulch's contention under Division A(2) was that he claimed that his report to OSHA involved criminal violations of state environmental law, R.C. Chapter 3704 and 3734, and that therefore his report to OSHA was authorized under Division

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[5] This was the first time this was raised. Appendix E, p. 24.

A(2). Further, even if no actual violation of those chapters occurred, he says he "reasonably believed" that the employer's conduct involved criminal violations of those state code chapters. *Kulch* at 148. Because Division A(2) permits an employee to report violation of those environmental chapters "to any appropriate" regulatory agency, and OSHA is "any" agency, Mr. Kulch says he has made a claim under the state statute.

If an Ohio statute allowing a report to "any appropriate public authority" about state environmental laws could arguably include the OSHA, the Occupational Safety and Health Act would thereby be engrafted onto the Ohio whistleblower act, Division A(2). Thus, OSHA has been employed by the Ohio Supreme Court to enlarge or "affect in any other manner"[6] Division A(2) of the whistleblowers statute itself.

With respect to the common law tort claim based on Division A(2), the Ohio Supreme Court also held that:

> "In the case at bar, appellant continues to have a viable claim for whistleblower protection, since he arguably complied with R.C. 4113.52(A)(2) in reporting matters to OSHA. Thus, to the extent that he complied with R.C. 4113.52, appellant has established a firm foundation for a *Greeley* claim for wrongful discharge in violation of the public policy embodied in the Whistleblower Statute. An at-will employee who is discharged or disciplined for filing a complaint with OSHA...is entitled to maintain a common law tort action against the employer for wrongful discharge/discipline in violation of public policy pursuant to *Greeley* and its progeny. Thus,

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[6] cf. 29 U.S.C. §653(b)(4)

> Appellant is entitled to maintain a *Greeley* claim against Appellees whether or not he complied with the dictates of R.C. 4113.52 in reporting his employer to OSHA." *Kulch* at 162. Emphasis added.

The Ohio Supreme Court found two bases for the tort, only one of which was Division A(2) enlarged, arguably, by OSHA. The other was OSHA itself. It found that OSHA alone satisfied the clarity element of the state public policy tort. *Id.* at Syllabus 1:

> "1) An at-will employee who is discharged or disciplined for filing a complaint with the Occupational Safety and Health Administration concerning matters of health and safety in the workplace is entitled to maintain a common-law tort action against the employer for wrongful discharge/discipline in violation of public policy pursuant to *Greeley v. Miami Valley Maintenance Contrs., Inc.*, 49 Ohio St.3d 228, 551 N.E.2d 981 (Ohio 1995) and it progeny."

In addition, the Court held that a violation of state statute, if proven under Division A(2), would also support a tort claim. If OSHA is to be found in Division A(2) on remand, and that Division sustains a tort claim, OSHA in a third way has been used by the Ohio court to "affect [state law] in any other manner." (cf. 29 U.S.C. §653(b)(4)).

The development of the law on public policy tort during the pendency of the instant matter will assist in the context. *Greeley v. Miami Valley Maintenance Contractors, Inc.*, 49 Ohio St. 2d 228, 551 N.E. 2d 981 (Ohio 1990) was decided in the year before Mr. Kulch had been terminated. It held that a violation of a public policy embodied in a statute that had no other remedy would serve as the basis of a tort

claim against the employer. In 1992, the year following Mr. Kulch's discharge, the Supreme Court clarified *Greeley in Tulloh v. Goodyear Atomic Corp.*, 62 Ohio St.3d 541, 584 N.E. 2d 729 (Ohio 1994) holding that absent any statutory authority there is no common law basis for a wrongful discharge tort claim. It was on the basis of these two precedents that the trial court made its decision in 1993. In 1994 when the state court of appeals matter was pending, the Supreme Court overruled *Tulloh* in *Painters v. Graley,* 70 Ohio St. 3d 377, 639 N.E. 2d 51 (Ohio 1994). In that case, the Ohio court adopted the paradigm for a prima facie case of public policy discharge from Henry F. Parritt, Jr., *The Future of Wrongful Dismissal Claims: Where does the Employer's Self Interest Lie?* 58 University of Cincinnati Law Review 1989, No. 2, page 397. That law review article identified the elements as the clarity element (clear public policy), the jeopardy element, the causation element and the defense of overriding justification. However, the *Painter* Court's third syllabus modified Professor Parritt's clarity element by omitting from his list of sources of public policy any federal statutes. The Ohio court defined public policy as:

> "Clear public policy quotes sufficient to justify an exception to the employment at-will doctrine is not limited to public policy expressed by the general assembly in the form of statutory enactments, but they also may be discerned as a matter of law such as the constitutions of Ohio and the United States, Administrative Rules and Regulations and the common law." *Id.* Syllabus 3.

By contrast, Professor Parritt's recitation included federal statutes.

Without modification of the elements of the tort, the

Ohio Supreme Court in the year before Mr. Kulch's appeal in this case, decided *Collins v. Rizkana*, 73 Ohio St.3d 65 (Ohio 1995) which reaffirmed the *Painter* syllabus and identified the clarity and jeopardy elements as legal not factual issues for determination by a court.

Thus, the Ohio Supreme Court, according to the law of the State of Ohio as expressed in its syllabi, held that federal statutes were not included as a basis of state public policy. The Petitioner below briefed the omission of federal statutes by the *Painter* syllabus was purposeful based on:

> "...our system of federalism where the doctrines of preemption and the supremacy clause are at work. The federal courts have determined that Section 11(c) does not have a private right of action; it is not for state courts to overrule them."

Appendix E, 29 Merits Brief, Footnote 20. Nonetheless, the Supreme Court in *Kulch* concluded:

> "Turning to the clarity element, we are easily able to identify at least two main sources of public policy prohibiting the alleged retaliatory discharge of Appellant based on his report to OSHA. For the reasons that follow, we find that each of these two sources of public policy is independently sufficient to justify an exception to the employment at-will doctrine and to warrant recognition of a cause of action for wrongful discharge in violation of public policy.
>
> The first main source of express public policy can be found in Section 660(c) Title 29 U.S. Code which specifically prohibits

employees from retaliating against employees (like Appellant) who file OSHA complaints Section 660(c) does not provide an employee with a private right of action against the employer... (*Id.* at 151)[7]. As explained in our decision infra, this federal statute constitutes a sufficiently clear expression of public policy to warrant an exception to the doctrine of employment at-will since the federal statute is consistent with Ohio public policy favoring workplace safety... Courts in other jurisdictions[8] have also determined that the public policy embodied in the federal Occupational Safety and Health Act, Section 651 et seq., Title 29 U.S. Code, may serve as a basis for recognition of a common law cause of action for wrongful discharge in violation of public policy (*Id.* at 152). Retaliation against employees who file OSHA complaints concerning unsafe or unhealthy conditions in the workplace is an absolute affront to Ohio's public policy favoring workplace safety. Such retaliation clearly contravenes the public policy of this state." *Id.* at 153. All emphasis added.

So holding that OSHA constitutes a clear independent statement of Ohio public policy, the Ohio Supreme Court has employed OSHA to enlarge and in any other manner affect

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[7] The court proceeds to create a cause of action despite this observation.

[8] Courts are divided on whether OSHA alone supports such a claim. See infra pp. 20-22.

Ohio public policy.

A Motion and Reconsideration or Rehearing was filed with the Ohio Supreme Court on April 26, 1997. The Petitioner asserted as grounds for reconsideration the OSHA neutrality statute 29 U.S.C. §653(b), Section 4(b)(4) both as it affects the foundation of a *Greeley* cause of action on OSHA as if it were state public policy, and, secondly the engrafting of OSHA onto the Division A(2) of the whistleblowers statute for remand. (cf. Appendix B.) On June 18, 1997, the Ohio Supreme Court denied Motion for Reconsideration. This petition is filed 90 days thereafter pursuant to Rules of the Supreme Court of the United States Rule 13 on September 16, 1997.

ARGUMENT

Petitioner's Legal Theory

In adopting OSHA, Congress had a unique approach to the system of federalism. The states had been the traditional protectors of workplace safety, with some successes and some failures. Therefore, Congress wished to both establish uniform safety standards and allow traditional state authority in the area. The Act does not completely exclude state regulation and neither does it give the states complete freedom. To accomplish this Congress created two complementary policies and a supplement that allowed for variance from that policy.

In the complementary design for regulation of workplace safety, Congress first provided that state law would be preempted where one of the federal uniform standards was in effect. The OSHA preemption statute states that the Act will not prevent any state agency or court from asserting jurisdiction with respect to a matter "to which no standard is in effect under Section 6." 29 U.S.C. §667(a), OSHA Section 18(a). This is a low threshold for preemption,

one that frustrates state jurisdiction by the existence of the standard without even considering whether there is a substantive conflict between the standard and state law.

As the necessary complement to such vigorous preemptive effect of the federal standards Congress added a neutrality provision so that states could continue their traditional role in regulating safety outside of the field covered by the federal standards. However, in that capacity, states could not tap OSHA as a source of their own state public policy.

The neutrality provision states:

> "[N]othing in this Act shall be construed to supersede or in any manner affect any workers' compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases or death of employees arising out of, or in the course of employment."

29 U.S.C §653(b)(4), OSHA Section 4(b)(4). (emphasis added).

The existence of a uniform standard forecloses states from a specific area and, in the open area, states may not use OSHA as their own public policy. Congress sought to create a highly specific safety code that was applicable on its own terms and did not choose to create a source of new private rights of action by employees outside of the scheme of the Act. In the neutrality provision, Congress did not merely focus on the standards but withheld everything in the Act ("nothing in this Act") from the states' tampering. Neither the express provisions nor the regulations create a civil cause of action. *Melerine v. Avondale*, 659 F.2d 706, 701 n. 7 (5th

Cir. 1981).

This complementary preemption/neutrality policy of OSHA is unique in Federal statutes. To make it even more unusual, Congress created a supplementary policy by which the states could circumvent the preemption/neutrality design and exercise total control over workplace health and safety as they had traditionally done in the past. To accomplish this, Congress added a provision whereby the complementary design for coordination of state and federal jurisdiction could be overridden by federally approved state legislation. Such legislation displaces OSHA and allows for complete State regulation of workplace safety. 29 U.S.C. §667(b), OSHA Section 18(b).

Certain conclusions are inherent in this design, One is that state and federal regulation were to stay in their respective spheres. Congress assured no interference with the express federal uniform regulations by states that may wish to regulate the same subjects. Secondly, the federal workplace safety law, in general, was further to be free of the interference of being applied by the states in their own jurisdiction, thus protecting uniformity of the entire federal portion of the field.

Also apparent from this design is that the only method to change this complementary structure is for states to adopt a state OSHA plan by legislation, not by judicial decisional law. After the statement of preemption in Section 18(a), Congress gave the states the option to submit a state plan under Section 18(b), 29 U.S.C. §667(b) and escape OSHA entirely. Given the policy of neutrality of OSHA as to state law, the existence of provisions for approval of a state plan by the Department of Labor (DOL) under Section 18(b) suggests that OSHA's neutrality can only be circumvented by federally approved legislation. A state plan is the exclusive means for a state to incorporate OSHA into its law without

affronting the neutrality policy[9].

Nothing in the entire Act prevents states from exercising their own jurisdiction, except the existence of a uniform federal standard. By contrast, the neutrality clause is applicable to the entire Act irrespective of whether there is a federal standard. Standards preclude state regulation unless circumvented by federally approved state legislation. By comparison, the rest of the Act allows no such deviation. Section 4(b)(4) withholds the entire Act form the states, including Section 11(c). Section 18(b) does not deviate from that neutrality. See 29 C.F.R. 1954(3)(c).

This case focuses the neutrality provision on employment torts. The neutrality clause withholds the entire Act from use by states in any way that affects two classes of state law: 1) worker compensation, and 2) "any law" with respect to injuries, disease or death of employees "arising out of or in the course of employment." Section 4(b)(4), 29 U.S.C. §653(b)(4), Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 Harv. L. Rev. 535, 543 (1987)("Indeed Section 4(b)(4) saves from preemption two forms of liability that, like criminal law, regulate workplace conduct and set implicit standards -- state workers' compensation and tort law.")

Section 4(b)4 prevents OSHA from being used to circumvent state workers' compensation laws. *Occupational Safety and Health Act of 1969; Hearings on H.R. 843, H.R. 3809, H.R. 4294, and H.R. 13373 before the Select*

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[9] See 29 C.F.R. §1902.3(b) and 29 C.F.R. §1902.4(c)(2)(v). To receive federal approval, the state plan legislation must include, inter alia, a provision similar to U.S.C. §660(c), Section 11(c), the OSHA non-retaliation section. That section the Ohio Supreme Court, without legislation approved by the Department of Labor, engrafted on to Ohio law contrary to the neutrality provision.

Subcomm. on Education and Labor, 91st Cong., 1st Sess., Part 2 at 1592-93 (letter of L.H. Silberman, Solicitor of Labor. This is the source of the line of cases beginning with *Practico v. Portland Terminal Co.*, 783 F.2d 255 (1st Cir. 1985) which holds this is the sole purpose of Section 4(b)(4).

The second class of state law that is to be left unaffected by both the standards and by OSHA generally are employment torts. "There is solid consensus that Section 4(b)(4) operates to save state tort rules from preemption." *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 54 (1st Cir. 1991). Under Section 4(b)4, the cases that have addressed torts outside the state workers' compensation law are typified by *Reis v. National R.R. Passenger Co.*, 960 F.2d 1156 (3rd Cir. 1992): "...In short, it defies reason to construe Section 653(b)(4) as only precluding private actions which would bypass workers' compensation. Had Congress intended such a result, it would not have drafted Section 653(b)(4) in such sweeping terms." *Id.* at 162.

To summarize, because the states were to continue in their traditional roles in regulating workplace safety, Congress created complementary policies to preserve federal safety legislation form state involvement. First, state jurisdiction is precluded where there is a specific safety standard. This prevents the possibility of conflicting regulations. Second, states were not to use any part of OSHA, standards or otherwise, to affect state law in any way including employment discharge torts. This prohibition prevents the possibility of conflicting interpretations of the federal law.

Reasons for Granting Review

Ohio abandoned the principle that Section 11(c) does not create a private right of action as established in *Taylor v. Brighton Corp.*, 616 F.2d (6th Cir. 1980) and therefore he

violated OSHA's neutrality.

Since Section 4(b)(4), 29 U.S.C. §653(b)(4) is not a statement of preemption of common or statutory law but a statement of the neutrality of the Act with respect to state law, the litigation under this section has focused on 1) whether the Act creates new rights under state law in addition to those already existing in state law or 2) whether the Act impacts preexisting rights under state law in any way. Both are prohibited.

The OSHA neutrality statute is violated by the Ohio Supreme Court's decision in two ways. It has used OSHA both directly and indirectly to enlarge or in any other manner affect state law, both statutory and common law.

First, in earlier case law, the Ohio Supreme Court held that a public policy discharge tort would lie based on the violation of a clear state public policy. In this case the Ohio Court decided that OSHA serves as the Ohio state policy basis for a an employment tort, independent of any other sources, with remedies of lost wages, medical expenses, disability payments and pain and suffering[10]. This is the creation of a new state tort cause of action based entirely on OSHA alone and using OSHA to impact preexisting rights and both are contrary to the neutrality required by Section 4(b)(4).

Second, the state legislation that also supports the employment tort is R.C. 4113.52(A)(2). There the Ohio General Assembly provided statutory remedies for whistleblowing in connection with specifically listed state environmental laws. The Ohio Supreme Court remanded for a lower court to determine whether OSHA would be included in the list of state environmental laws so as to allow the

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[10] The types of remedies that the federal law is concerned with are lost wages, medical expense and disability payments. 29 U.S.C. §651(a), OSHA Section 2(a).

employee to obtain a statutory remedy under the state whistleblower statute and thereupon support both an Ohio statutory and common law tort claim. This holding would allow lower courts of Ohio to hold that OSHA can be incorporated directly into a state statute and to indirectly support a state tort, all without following the strictures of Section 18(b) for federally approved legislation and contrary to neutrality required by Section 4(b)(4).

A) The Important Federal Question of OSHA's Neutrality with Respect to State Law Should be Decided by this Court and Has Not.

The leading cases of this Court that are analogous did not decide the questions presented under the neutrality provision. They are *Gade v. National Solid Waste Management Association,* 505 U.S. 88, 112 S.Ct. 2374 (1992) and *English v. General Electric,* 496 U.S. 72, 110 S.Ct. 2270 (1990). Both are preemption cases and did not consider the neutrality statute.

In *Gade v. National Solid Waste Management Association*, 505 U.S. 88, 112 S.Ct. 2374 (1992) state legislation arguably regulated what a published federal standard also regulated. This Court had no difficulty in rejecting Illinois' attempt to encroach upon federal jurisdiction with an unapproved regulation regarding hazardous waste site workers, which OSHA also regulated. However, the state had not submitted a plan for approval and therefore its legislation was preempted by Section 18(a). This Court endorsed the standard that any state law which constitutes a regulation of worker health and safety is implicitly in conflict with the purposes and objectives of the Act and so is preempted. Actual conflict in terms between the state and federal regulation is not the test. Even state law meant for a wholly different purpose (dual purpose

regulation) and state law merely supplemental to OSHA are preempted by this test. Indeed, Congress rejected a proposal that would have preempted only those state regulations that were "in conflict" with the federal legislation.See Section 14(b)(1) in S. 2788 and H.R. 13373, 91st Cong., 1st Sess. (1969) reprinted in Subcommittee on Labor, The Senate Committee on Labor and Public Welfare, 92nd Cong., 1st Sess., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY & HEALTH ACT OF 1970 (Comm. Print. 1971) at 58, 706. Regardless of the substantive terms and whether they are in harmony or conflict, the existence of a state regulation on occupational health and safety, outside of a federally approved state plan affronts "the full purposes and objectives of the OSHAct." *Id.* at 98-99.

The issue raised here is one that is complimentary to the decision reached in *Gade*, i.e., a second prong not considered before. In this case, the syllabi of the Ohio Supreme Court violate OSHA's neutrality and incorporate OSHA into state tort law. It does not involve state law that regulates what an OSHA standard has already regulated. Rather, the Ohio Supreme Court makes OSHA a source of state public policy contra Section 4(b)(4). It is not a question of whether the state court syllabi are in conflict generally, or even specifically, with OSHA but rather the reverse: whether OSHA is a permissible source of state law. Congress has specifically withheld OSHA from that role in the neutrality provision and no court has decided the effect in retaliation discharge torts.

The courts that have held that a public policy discharge tort is not preempted by OSHA also have not considered the OSHA's neutrality statute, Section 4(b)(4). The source of such lower court decisions is *English v. General Electric*, 496 U.S. 72, 110 S.Ct. 2270 (1990), a case holding that the common law of intentional infliction of

emotional distress was not preempted by the Energy Reorganization Act, (ERA). However, the ERA did not have the benefit of a statute remotely similar to Section 4(b)(4). The ERA's savings clause, 42 U.S.C. 5851(h), entitled "Nonpreemption," states that the ERA is not intended to affect the employee's right to seek redress for retaliation claims otherwise available to the employee under state or federal law. By contrast, the OSHA neutrality clause is far more expansive. It prohibits the use of OSHA "to enlarge, diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees" unless a state plan is adopted. The ERA simply did not preempt state employment law. OSHA goes further; OSHA may not be state law. Courts which applied *English* to a public policy tort based upon OSHA did not account for the neutrality provision, Section 4(b)(4), *Fragassi v. Neiburger*, 269 Ill. App. 633, 646 N.E.2d 315 (2nd Dist. Ill. 1995)[11].

Only one state law retaliatory tort case has been located that addressed Section 4(b)(4) at all. In *Phillips v. General Electric Co.*, 881 F.Supp. 1553 (N.D. Ala. 1995) the court held that a claim under the Alabama workers' compensation statute governing reports of safety violation was not preempted. In addressing Section 4(b)(4), it held that workers' compensation was a remedy for injury to employees, was saved from preemption by the neutrality clause, Section 4(b)(4). In other words, OSHA neither preempted the workers' compensation reporting statute nor affected it in any other manner. That court then turned to apply the state law by its own terms. The court did not need

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[11] The Illinois Supreme Court mentioned Section 4(b)(4) only as a basis for the lower court's decision that it reversed, but never substantively addressed it.

to reach the additional step that this case submits, i.e., that Section 4(b)(4) precluded OSHA Section 11(c) from becoming the state law.

No Court where Section 11(c) issues arose in the context of public policy discharge torts never considered the neutrality provision in the scheme of the Act. This is true of those that held it was preempted as well as those that held it not to be preempted. Of the latter, nearly all based the tort on some state policy and not OSHA alone and even disavowed OSHA as the source. Often the filing was with a state public authority and not under OSHA. Although one federal district court did so, before Ohio no state supreme court created a state common law remedy exclusively and independently based on OSHA both directly, and indirectly as did Ohio.

State cases that have allowed similar tort claims based on OSHA filings have not considered the effect of Section 4(b)(4) in part, because the state tort was not dependent on OSHA as the Ohio court found, but on separate state workplace safety policy. "This is a *Pierce* (retaliatory discharge tort) claim which is entirely separate from the assertion of a claim under OSHA." *Cerracchio v. Alden Leeds, Inc.*, 538 A.2d 1292 (N.J. Super A.D., 1988) at 1298. In holding retaliatory tort as not preempted by OSHA, without considering Section 4(b)(4), *Lapore v. National Tool & Mfg. Co.*, 540 A.2d 1296 (N.J. Super A.D., 1988) found that OSHA did not prohibit states from providing a remedy where the tort did not seek to remedy a violation of the Act but rather violation of state public policy. ("...plaintiff seeks to remedy a retaliatory discharge in violating state laws and public policy. It is entirely distinct from §660(c)(1) private cause of action." *Id.* at 1307.) Likewise, "[Plaintiff] is not seeking a remedy under OSHA, however, he requests relief only under Illinois law." *McElroy v. S.O.S. International, Inc.*, 730 F.Supp 803 (N.D. Ill. 1989) at 807.

In *Cloutier v. Great Atlantic & Pacific Tea Co.,Inc.*, 121 N.H. 915, 436 A2d 1140 (N.H. 1981), one case cited by the Ohio Supreme Court, the public policy basis of the retaliatory discharge tort urged was the OSHA general duty clause, 29 U.S.C. §654 in connection with a burglary. The court, after reciting the parties' argument on the general duty clause, concluded ":[h]owever, without the existence of OSHA, the facts before us support the conclusion that the plaintiff was discharged for the laudable public policy [of protecting persons who worked for him]." The court also sustained the claim on a state statute regarding a day of rest. As with all the cases in this area, the OSHA neutrality provision is ignored. OSHA was not found to be a sole independent basis of the tort.

In *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987) the court found no preemption where the tort claim rested on California law. Neither did OSHA preempt a tort claim premised on reports made to a state agency in *Kilpatrick v. Delaware County Soc. for Prevention of Cruelty to Animals,* 632 F.Supp. 542 (E.D. Pa. 1986). The employee was discharged for reporting to the State Department of Agriculture. The court held her retaliatory tort claim was not preempted by OSHA and added, in the absence of a Pennsylvania Whistleblower Statute, that OSHA supplemented state public policy approving the making of complaints to government agencies, even if not to OSHA. It did not make OSHA complaints actionable in tort nor did it consider Section 4(b)(4).

The Ohio Supreme Court cited *Sorge v. Right's Knitwear Corp.* (E.D. Penn. 1993) 832 F.Supp. 118 which followed *Kilpatrick*. *Sorge* is the only court before Ohio to find Section 11(c) to be state public policy that independently supports retaliatory tort claims. The District Court reached this conclusion in the absence of a decision by Pennsylvania Supreme Court and also did not consider Section 4(b)(4).

By contrast three cases, *Braun v. Kelsey*, 635 F.Supp. 75 (E.D. Pa. 1986), *Walsh v. Consolidated Freightways, Inc.*, 278 Or 547, 563 P.2d 1205 (Oregon 1977) and *Corbin v. Sinclair Marketing, Inc.*, 684 P.2d 265 (Colo. App. 1984) applied preemption to state retaliatory discharge. Neither did these courts expressly address Section 4(b)(4), but their conclusions impliedly support the Petitioner's reading of Section 4(b)(4) neutrality and are consistent with cases that base the tort on state law, not OSHA alone.

Without this Court's review, courts will continue to not only fail to account for the neutrality clause of the Act but will continue to confuse the reciprocal nature of policies of preemption and neutrality embodied in the Act.

B) The Ohio Supreme Court Decision Conflicts with Other Courts' Interpretation of the OSHA Neutrality Statute.

The reciprocal nature of Section 4(b)(4) as a saving clause establishes the neutrality of OSHA vis a vis the states. Section 4(b)(4) has been used as savings clause to a shield claims from preemption because they involve state law, e.g., workers' compensation law, per *Phillips*, supra. However, it has also been used as a sword to strike down tort claims where states sought to base their causes of action, in whole or in part, substantially on OSHA as their basis, i.e., to save OSHA from the states. This latter case is typified most by the negligence per cases[12] that often cite a specific standard or

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[12] Negligence *per se* and public policy discharge torts are vastly similar. Compare: W. Prosser THE LAW OF TORTS §3 at 192-97, 200; RESTATEMENT (SECOND) OF TORTS §286 (1965) and Parritt, supra, p. 9. Both rely upon a public policy violation plus causation and damage. The retaliation tort includes the employment

the OSHA general or special duty. Section 5(a), 29 U.S.C. 654(a). Many courts have held that OSHA violations cannot become a substantive element of a state cause of action so as to be conclusive of the state law issue. In those cases, Section 4(b)(4) has been used to strike down the claim and not merely to save it from preemption.

What this case presents is the same scenario with respect to employment tort law. The Ohio Supreme Court has based an entire tort cause of action on OSHA Section 11(c). Indeed in defining the tort elements, the Ohio court stated that proof of violation of the underlying statute is necessary when applying the Ohio whistleblower Act. *Contreras v. Ferro Corp. et al.*, 73 Ohio St. 3d. 244 (Ohio 1995). Per force the same must be true of the independent OSHA Section 11(c) cause of action under state law.

Courts have applied the neutrality provision in rejecting common law negligence claims and claims based on premises and products liability which had attempted to use the OSHA standards to establish the causes of action. Those courts readily cite the prohibition against creating private rights of action based on OSHA alone. However, the retaliatory discharge tort, unlike many of the neutrality clause cases, actually involves employees and should be decided likewise.

The Third Circuit interpreted the role of Section 4(b)(4) in relation to state tort law in *Reis v. National R.R. Passenger Corp.*, 960 F.2d 1156 (3rd Cir. 1992), a negligence *per se* case under FELA. "[W]e have found no case where absolute liability has been imposed for violation

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element; negligence *per se* includes the element of protected class of the statute in question. The only difference is that not all retaliatory torts render physical injury. Here, however, Mr. Kulch has raised his heart condition and emotional distress as a basis for the remedy.

of an OSHA regulation against a claim that the express language of OSHA prohibits the creation of liability." *Id.* at 1161. The *Reis* Court concludes: "[w]e hold that...a violation of an OSHA regulation could not constitute negligence *per se*..." *Reis*, 960 F.2d at 1165. If a violation of an OSHA regulation could be used as evidence of negligence *per se*, it would be almost axiomatic that the effect would be to "enlarge or diminish or affect" the statutory duty or liability of the employer. *Id.* at 1162. Even if the state tort based on an OSHA violation would not "enlarge" employers' liability, because it merely defined an existing duty, "we are hard pressed to say that it would not 'affect' liability." *Id.*

In realizing this result, the Third Circuit relied heavily on *Minichello v. U.S. Industries, Inc.*, 756 F.2d 26 (6th Cir. 1985). The Sixth Circuit stated that under Ohio law "OSHA regulations can never provide a basis for liability because Congress has specified that they should not." *Id.* at 29 (citing 29 U.S.C. §653(b)(4)). The court found that OSHA could not be used to establish one element of a products liability tort, (i.e., whether the product was unreasonably dangerous, otherwise OSHA would "alter the court standard of liability." *Id.* at 29.)

Nonetheless, there is a conflict among courts on the role and scope of OSHA in establishing state torts, and also whether OSHA is admissible as evidence of state torts.

In the disparity of applying Section 4(b)(4), most federal cases and a few state courts, including Ohio, preclude OSHA from any role in establishing a state tort. See *Merritt v. Bethlehem Steel Corp.*, 875 F.2d 603 (7th Cir. 1989) (OSHA could not be used to expand or otherwise affect the common law duties or liabilities under a negligence *per se* theory as to an independent contractor because workers' compensation is exclusive remedy). In *Melerine v. Avondale*, 654 F.2d 706 (5th Cir. 1981) at 701, n. 7, the plaintiff argued the OSHA violation established negligence *per se*. The court

concluded he was not in the protected class of the regulation and could not establish the threshold standing at 710-712. *Albrecht v. Baltimore & Ohio R.R.*, 808 F.2d 329 (4th Cir. 1987) and *Byrd v. Fieldcrest Mills*, 496 F.2d 1323 (4th Cir. 1974) (an OSHA violation did not constitute negligence); *Practico v. Portland Terminal Co.*, 783 F.2d 255 (1st Cir. 1985) at 256 (the words "enlarge, diminish, or affect" did not allow courts to create a private cause of action for injured workers which would allow them to bypass workers' compensation)[13]. *Bertholf v. Burlington Northern R.R.*, 402 F.Supp. 171, 173 (E.D. Wash. 1975) (finding that an OSHA violation does not constitute negligence *per se* under FELA); *Hebel v. Conrail*, 475 N.E.2d 652 (Ind. 1985); ("We have found no case where absolute liability has been imposed for violation of an OSHA regulation against a claim that the express language of OSHA prohibits the creation of liability."); *Wendland v. Ridgefield Constr. Serv., Inc.*, 184 Conn. 173, 439 A.2d 954, 956-7 (Conn. 1981); ("we do not find these decisions persuasive because these opinions have not confronted a statute analogous to 29 U.S.C. 653(b)(4)..." holding that a negligence *per se* jury instruction based on a violation of OSHA was erroneous because such an instruction "affects [the] common law rights, duties and liabilities of employers and employees"). Other State decisions have also refrained from violating the neutrality provision by refusing to make OSHA an element of the state tort. *Valdez v. Cillessen & Son, Inc.*, 105 N.M. 575, 578, 734 P.2d 1258, 1261 (New Mexico 1987). *Canape v. Petersen d/b/a/ Western Hills Court*, 897 P.2d 762 (Colo. 1995).

The Ohio Supreme Court itself, applied the neutrality

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[13] Although *Practico* applies Section 4(b)(4) to save workers' compensation injury claims from preemption, it is alone in holding that is its sole purpose. Cf. *Reis supra* at 162.

provision in *Hernandez v. Martin Chevrolet,* 72 Ohio St. 3d 302 (Ohio 1995) when it rejected a suit by a non-employee to expand premises liability by negligence *per se* based upon OSHA Section 4(b)(4). In *Kulch*, however, it refused to consider that issue (e.g., Appendix A and B).

The other strand of the conflict is represented primarily by state courts that have allowed OSHA to serve as the basis of a state tort. *Sanchez v. Galey*, 112 Idaho 609, 733 P.2d 1234 (Idaho 1986) (allowing negligence *per se* based on an OSHA violation); *Kelley v. Howard S. Wright Const. Co.*, 90 Wash. 2d 323, 582 P.2d 500 (Wash. 1978) (holding that the general contractor, had a duty to comply with the OSHA regulations as to an employee of a subcontractor); *Koll v. Manatt's Transp. Co.*, 253 N.W.2d 265, 270 (Iowa 1977) (ruling that a violation of an OSHA regulation by an employer is negligence *per se* without discussing the effect of the state statute equivalent to 29 U.S.C. §653(b)(4).)

The Sixth Circuit is so self-contradictory on Section 4(b)(4) that it illustrates the confounding confusion over this statute's application to state tort law. *Ellis v. Chase Communications,* 63 F.3d 473 (6th Cir. 1995) sought, unsuccessfully, to harmonize *Minichello*, supra, with *Teal v. E.I. Dupont de Nemours & Co.*, 728 F.2d 799 (6th Cir. 1984). The *Teal* court found under Tennessee law that OSHA's specific duty clause, 29 U.S.C. §654(a)(2) would constitute negligence *per se*. It did not consider Section 4(b)(4) since the parties agreed that the standard of care was based on OSHA regulations. *Id.* at 803-5. Later in *Ellis*, the court insisted that *Teal* did not abandon *Minichello,* i.e., OSHA did not create a private right of action. "OSHA can never provide a basis for liability." *Ellis* at 471. However, in *Ellis,* the court held that violation of the OSHA specific duty clause would be conclusive of negligence *per se* except that the defendant there was not responsible for OSHA

compliance. But see, *Russell v. Bartley,* 494 F.2d 334 (6th Cir. 1974) which observed that "the better reasoned view [is], however, much of that litigation addresses whether enactment of OSHA is ground for expansion of state common law negligence *per se* that OSHA violations do not constitute a basis for assigning negligence as a matter of law."

Between the opposition of *Minichello/Russell* and *Ellis/Teal* is dicta in *Bailey v. V & O Press Co.,* 770 F.2d 601 (6th Cir. 1985) which states: "compliance with OSHA in some cases is probative of a manufacturer's duty of care." Nevertheless, following the *Minichello* holding, *Bailey* held that refusal to admit OSHA standards into evidence was proper, but, because they were referred to in testimony, there should have been a limiting instruction. In an unreported decision, the Sixth Circuit confesses but refuses to address the intra circuit conflict regarding Section 4(b)(4) on the role of OSHA regulations as evidence of the standard of care. *Williams, et al. J.I. Case Company, et al.,* 963 F.2d 374 (Table), (6th Cir. Case No. 91-5700, May 22, 1992 unpublished) 1992 W.L. 111809. (Appendix O.)

The Third Circuit, author of the *Reis* line of cases, in *Rolick v. Collins Pine Company,* 975 F.2d 1009 (3rd Cir. 1992) cert. denied 507 U.S. 973, 113 S.Ct. 1417, 122 L. Ed. 2d 787 (1993) held both that an OSHA standard was admissible evidence of the duty of care but that proof of violation of the standard cannot support a state cause of action for negligence *per se*. It winks at the "sweeping language" of Section 4(b)(4) to suggest that evidentiary use does not "affect" state law "in any other manner." The Third and Sixth Circuits appear to be on both sides of the issues. In the Third Circuit, the *Rolick* court also observed, but refused to resolve, the conflict.

Absent this Court's review this conflict will not resolve but shows every sign of becoming intra jurisdictional in both state and federal systems.

Summary

The extension of the public policy tort exception of the at-will employment doctrine based upon a provision in OSHA is in conflict with 29 U.S.C. §653(b)(4). Similarly, the remand holding in this case which permits the lower court to read Ohio Revised Code §4113.52(A)(2) to incorporate OSHA directly and thus indirectly support a public policy tort claim are also both contrary to 29 U.S.C. §653(b)(4).

Section 4(b)(4) applies to state torts other than workers' compensation law, and withholds OSHA as a source of law for those employment torts. Just as workers' compensation is not meant to be bypassed by direct OSHA claims, neither are other employment torts to be circumvented. This case presents an employment tort of retaliatory discharge that allows the typical range of damages for relief as any tort cause of action. Like negligence *per se*, products and premises claims, the tort of public policy retaliatory discharge based on Section 11(c), directly or indirectly, "enlarge[s]...or affect[s] in any other manner...the common law or statutory rights, duties, or liabilities of employers...with respect to injuries, diseases, or death of employees..." 29 U.S.C. 653(b)(4).

The courts that have addressed retaliatory discharge under OSHA, whether they have held such claims are preempted or not, have failed to address Section 4(b)(4). Neither has this Court addressed it. On the other hand, those courts that have applied Section 4(b)(4) to state torts have reached diverse results, to the extent that one circuit, the Sixth, appears totally confounded by it and the Third may be following. The Ohio Supreme Court has ignored Section 4(b)(4) in this case, although it has applied it as to other torts not involving employees. This Court has not addressed, and other courts have impossibly confused the issue over whether the OSHA Act and standards can serve as an element of state

employment tort claims or may even be admissible to prove an element of such claims. The statute excludes from the States' usage all reference to OSHA by sweeping language like "affect in any other manner". This should be sufficient to preclude OSHA from being actionable state public policy or even as evidence under state law theories. Yet the courts have not reached consensus. Absent this Court's review, the confusion over the role of OSHA as state public policy will continue to affect injury and employment law alike.

CONCLUSION

The Court should grant this petition for a writ of *certiorari*.

Respectfully submitted,

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Dated: September 16, 1997

APPENDIX

APPENDIX A

No. 95-650
1997 Term

THE SUPREME COURT OF OHIO

FILED
June 18, 1997
Marcia Mengel, Clerk
Supreme Court of Ohio

JAMES KULCH, *Appellant*,	)	
v.	)	**RECONSIDERATION ENTRY**
STRUCTURAL FIBERS, INC., *Appellee*.	)	

IT IS ORDERED by this Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. 93G1824)

/s/_____
THOMAS J. MOYER
Chief Justice

APPENDIX B

IN THE SUPREME COURT OF OHIO

CASE NO. 95-650

Appeal from the
Eleventh District
Case No. 93 G 1824

JAMES KULCH

Plaintiff-Appellant

vs.

STRUCTURAL FIBERS, INC., et al

Defendants-Appellees

MOTION FOR RECONSIDERATION AND RE-HEARING
S. Ct. Prac. R XI § 2

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The Occupational Safety and Health Administration Act (OSHA) federal statute and by its terms is not a statute of a state public policy so as to give rise to a public policy tort cause of action so that the syllabus is in conflict with federal law [1]

GROUND FOR RECONSIDERATION NO. 2

Remand of statutory and common law action based on R.C. 4113.52(a)(2) conflicts with federal law . . . . . [9]

GROUND FOR RECONSIDERATION NO. 3

Overruling Phung, supra destroys the basis for a Greeley public policy tort and does not change the historical fact of its role in the legislative intent behind R.C. 4113.52 and should be rescinded . . . . . [10]

GROUND FOR RECONSIDERATION NO. 4

The remand of a public policy tort action and statutory absence predicated on R.C. 4113.52(A)(2) fails to apply the rigor of strict compliance with the underlying statute as enunciated in the syllabus . . . . . [16]

GROUND FOR RECONSIDERATION NO. 5

In addition to prior grounds for reconsideration, Constitutional concerns of the separation of powers under the republican form of government that guarantees due process and equal protection require reconsideration of the decision on the merits . . . [18]

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29 U.S.C. §651(a) . . . . . [3]

29 U.S.C. §652(5) . . . . . [3]

29 U.S.C. §653(b) . . . . . [3,5,10]

29 U.S.C. §660(c) . . . . . [4,6]

29 U.S.C. §667(c) . . . . . [3,4,5,10]

29 U.S.C. §1001 et seq . . . . . [7]

29 U.S.C. §1611 et seq . . . . . [8]

29 U.S.C. §2601 et seq . . . . . [8]

42 U.S.C. §2000e et seq . . . . . [8]

42 U.S.C. §12101 et seq . . . . . [8]

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29 C.F.R. §1902.3 . . . . . [4,10]

29 C.F.R. §1902.4 . . . . . [5,10]

29 C.F.R. §1954.3 . . . . . [5,10]

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Tab 6 - Rules of Court
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[viii]

[1]

Appellees move for reconsideration and rehearing of Kulch v. Structural Fibers, Inc. (1997), 78 Ohio St. 3d 134 pursuant to S. Ct. Prac. R. XI, Section 2 with respect to the decision on the merits of this case mindful the grounds are not a re-argument of the case. Grounds for reconsideration and re-hearing are set forth below. This Motion is filed 10 days from issuance of the judgment entry, April 16, 1997 by filing with the clerk on the Monday following, April 26, 1997 (Saturday), under S.Ct. Prac. R. XIV(3)(A).

PART I

With respect to syllabus no. 1:

1). An at-will employee who is discharged or disciplined for filing a complaint with the Occupational Safety and Health Administration concerning matters of health and safety in the work place is entitled to maintain a common law tort action against the employer for wrongful discharge/discipline in violation of public policy pursuant to Greeley v. Miami Valley Maintenance Contractors, Inc. (1990), 49 Ohio St. 3d 228, 551, N.E. 2d 981 and its progeny.

APPELLEE'S GROUND FOR RECONSIDERATION NO. 1

The Occupational Safety and Health Administration Act (OSHA) is a federal statute and by its terms is not a statute of a state public policy so as to give rise to a public policy tort cause of action so that the syllabus is in conflict with federal law.

(As to syllabus no. 1)

The syllabus affronts Congressional expression and intent of OSHA and interpretation by the federal judiciary. The majority

held that, irrespective of compliance with state law (R.C. 4113.52), a person filing a complaint with OSHA is entitled to maintain a common law tort action for violation of public policy against an employer who wrongfully discharges or disciplines him for making such a complaint. This holding is propelled because OSHA was found to satisfy the clarity element of the public policy tort in that the claim of dismissal motivated by such filing satisfies the jeopardy element.[1] As for the clarity element, the Court reasoned, "this federal statute constitutes a sufficiently clear expression of public policy to warrant an exception to the doctrine of employment at-will, since the federal statute is consistent with Ohio's public policy favoring work place safety. ... Ohio public policy is clearly in keeping with the laudable objectives of the Federal Occupational Safety and Health Act. The public policy of this State demands that employees be provided with a safe work environment and that unsafe working conditions be corrected." Kulch v. Structural Fibers at 152.

The majority's reasoning is opposed to federal law. The issue in Greeley is not whether the federal law conforms with state policy, but whether Ohio has a "clear public policy sufficient to justify an exception to the employment at-will doctrine." Painter syllabus 2. OSHA is not a clear public policy of the state of Ohio. It is a clear public policy of the United States enacted by Congress whose expression and intent have been totally ignored by this Court.

The enabling statute for OSHA provides in pertinent part:

> **Nothing in this Act** shall be construed to supersede or in any way affect any workers' compensation law or to **enlarge or diminish or affect in any other manner the common law** or statutory rights or duties or liabilities of employers and employees under any law with respect to

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[1] Painter v. Graley (1994), 70 Ohio St. 3d 377, 639 N.E. 2d 51 at 57 at 384 footnote 8.

> injuries, diseases, or death of employees arising out of or in the course of employment.

29 U.S.C. §653(b)(4), emphasis added. The work place harms OSHA was intended to address without affecting state law are wage loss, medical expenses and disability payments. 29 U.S.C. §651(a).

The public policy tort exception to employment at-will is a common law cause of action for tort damages related to employment. As such, it is precisely a source of law that the Congressional intent dictated should not be enlarged or diminished or affected in any manner by OSHA. Predicating a public policy tort based on OSHA flies in the face of this Congressional policy. This Court, on an issue of law that did not involve the employment relationship, has held that the above statute forecloses OSHA as a source of Ohio common law. Herandez v. Martin Chevrolet, Inc. (1995), 72 Ohio St. 3d 302, 649 N.E. 2d 1215. In the instant case, where employment law is squarely at issue and which involves application of tort remedies, the same result is necessary under that precedent. Further the statutory scheme of OSHA, as designed by Congress, shows it was never intended to be a source of State public policy unless the State conforms with its terms.

In its threshold coverage, OSHA relates to employers which are persons engaged in businesses affecting interstate commerce, but not the United States or the political subdivision of the State. 29 U.S.C. §652(5). Thus, intrastate businesses are not affected by the OSHA nor are public employers located anywhere in the State Ohio. Effectively, many of the largest employers within the state the Ohio, the various political subdivisions, are public bodies to whom OSHA is not relevant. It is far from a state-wide policy.

While §653(b)(4) withholds OSHA from state law and §652(5) excludes usage parts of state employment in the state law, Congress did expressly allow states the opportunity for the development and enforcement of occupational safety standards that would make OSHA part of state law. 29 U.S.C. §667. State plans to incorporate OSHA into state law are subject to conditions for

approval by the Secretary of Labor. See §667(c)(2). To date, the General Assembly of Ohio has not introduced, or adopted enabling legislation to submit a state jurisdiction plan to the Department of Labor for approval. Ohio has seen fit not to incorporate OSHA into state public policy by the only means permitted by Congress via state legislation and DOL approval. It is therefore not apropos the judiciary to do so.

The criteria for state plans set out by the Department of Labor at 29 C.F.R. §1902 lists under specific criteria, §1902.3(b) enforcement:

> (1) The State plan shall provide a **program for the enforcement** of the State standards which is, or will be, **at least as effective as that provided by the Act,** and provide assurances that the State's enforcement program will continue to be at least as effective as the Federal program. Indices of effectiveness of the State's enforcement plan against which the Assistant Secretary will measure the State plan in determining whether it is approvable are set forth in §1902.4(c). (emphasis added.)

To be at least as effective as OSHA, the State plan enforcement scheme should address discrimination as does §11(c), 29 U.S.C. 660(c).

The regulations at 29 C.F.R. §1902.4(c) indicate the standards by which the Secretary will review the enforcement procedures of the State plan to determine effectiveness including whether the State plan:

> Provides necessary and appropriate protection to an employee against discharge or discrimination in terms and conditions of employment because he has filed a complaint, testified or otherwise acted to exercise rights under the Act for himself or others, by such means as providing for appropriate

> sanctions against the employer for such actions and by providing for the withholding, upon request, of the names of complainants from the employer.

29 C.F.R. §1902.4(c)(2)(v). Thus, OSHA is not to affect State law unless specifically by a legislative plan submitted to the Secretary of Labor which plan must include discrimination provisions to meet the effectiveness standard of the Secretary. This is the only means by which an OSHA discrimination provision can be incorporated into State law, and not by the State judicial decree.

Plans that are DOL approved still cannot avoid federal jurisdiction for OSHA discrimination. At 29 C.F.R. §1954(3) the DOL states procedures for evaluation and monitoring of approved State plans and provides guidelines for the exercise of federal discretionary authority including §1954.3(e):

> (e) Discrimination Complaints. State plan provisions on employee discrimination do not divest the Secretary of Labor of any authority under §11(c) of the Act. The federal authority to investigate discrimination complaints exists even after an affirmative 18(e) determination (See, South Carolina decision 37 F.R. 25932, December 6, 1972). The employee complaints alleging discrimination under §11(c) of the Act will be subject to federal jurisdiction.

Therefore, Congress has designed OSHA such that it would not have any effect on work place common law or statutory law. §653(b)(4). When the State desires to incorporate OSHA into its public policy, it must do so by the submission of a legislated plan to the DOL under §667(c). The condition for approval of such plan includes provisions for enforcement standards including provisions for discrimination. Thus, a State plan must have some statutory provision for discrimination under that is at least as effective as §11(c). However, the Secretary makes clear that even if he approves of the State plan that includes discrimination provisions

under state law, those provisions do not oust the federal jurisdiction over §11(c). OSHA §11(c) continues independent of state law even if there has been federal approval of state legislation. OSHA §11(c) cannot become state policy in the presence or absence of a State plan.

In opposition to this detailed statutory design, whereby Congress has prevented state reliance on OSHA except in the method prescribed, and preserving §11(c) jurisdiction independent of even DOL approved state law, this Court has incorporated OSHA and §11(c) into the common law of public policy tort. Should it let this syllabus stand, it could not have acted more in opposition and affront to federal law. Because the General Assembly has opted not to make OSHA a statewide public policy, Congress has prevented the Court from enlarging, diminishing or affecting state employment torts via a Greeley cause of action.

Secondly, the federal judiciary, applying and interpreting OSHA, has held that no private right of action can be predicated on §11(c). OSHA provides for an administrative remedy for an employee who alleges discharge/discipline motivated by filing an OSHA complaint. The administrative remedy for the employee to file a charge to allow the Department of Labor to investigate and makes a determination on whether to pursue judicial action. Federal Courts have held that there is no private right of action that employees have with respect to 29 U.S.C. §660(c). Taylor v. Brighton Corporation (6th Cir., 1980, Ohio), 616 F.2d 256. Since OSHA does not enlarge, diminish or affect state employment law, the Congressionally designed administrative remedy for retaliation cannot become state public policy. It is clearly not for the state courts to supply a private right of action precluded by the statute and by the federal cases otherwise OSHA litigants have greater rights in state court than federal court where there is neither a private right of action nor tort relief.

The incorporation of OSHA, a federal statute, into the public policy of Ohio for the purposes of establishing the clarity element of a public policy tort is extremely improvident for the entire development of the law in this area. In effect, if OSHA can be the basis of a statewide public policy then every federal statute

can be a basis of federal policy. Federal not state law is supreme where there is a conflict according to the supremacy clause. Constitution of United States, Article VI, Clause 2. This case threatens to stand the federal system on its head. The federal statutes, with respect to employment, to varying degrees, have preemptive policies or other limitations of actions in terms of remedies or administrative proceedings. Granting a state tort claim on the basis of federal law sets the stage for affront to Congressional legislation and indeed to the Constitution itself. Not all statutes may present the extreme conflict that OSHA does in this case, but the majority's analysis in this decision is so deficient by failing to examine the conflict that it can become state law grounds for this or other courts to extend Greeley blithely to other federal legislation.

By way of example, and not exhaustive, the Court should consider the effect of its holding on such other statutes as the National Labor Relations Act (NLRA). 42 U.S.C. §151 et. Seq. Like OSHA, that Act also has exclusively administrative remedies in which an independent federal agency takes charges, holds hearings and pursues judicial recourse on behalf of individuals. 29 U.S.C. §160(c). Those individuals are not necessarily members of unions. They may be persons who file petitions for representation, elections or they may be persons who file charges based upon Section 7 rights (29 U.S.C. §157) as non-union members (e.g., protected concerted activities.) They can be non-union members who file charges against unions. They can be persons whoa re union members who file charges at a time when they are not subject to a union contract that provides recourse for discharge (i.e., at-will union employees). If under the analysis of this case a public policy tort will lie for OSHA which has an administrative remedy, what distinction is there for persons who file charges under the National Labor Relations Act?

To similar effect, this precedent can be used to undermine the remedial scheme of the Employment Income Retirement Security Act. 29 U.S.C. §1001 et seq. That act as interpreted by the federal courts provides only for contract damages. The extension of this decision would allow for enhancement of those

damages under state law that would not be permitted under federal law. The same is true for COBRA, Title X of the Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. §1611 et seq., the Family Medical Leave Act, 29 U.S.C. §2601 et seq. and the Fair Labor Standards Act, 29 U.S.C. §201 et seq. With equal force, statutes that already provide remedies, albeit limited, such as the ADA, 42 U.S.C. §12101 et seq., ADEA, 29 U.S.C. §621 et seq. and Title VII, 42 U.S.C. §2000(e) et seq. now have a state law basis for unlimited tort damages. Certainly if statutes of state origin with remedies such as R.C. 4113.52 can be the basis for such a tort, federal statutes with remedies can also provide basis for state law policy by example of this syllabus.[2]

Thus, creating a public policy tort using federal laws as a state policy without considering the inherent federal conflicts is wrong and so affronts the system of federalism whereby the law of the land is supreme as be made by Congress, interpreted by the federal judiciary. This case circumvents the design and intent of Congress for OSHA by state court fiat. There is no reason to believe that Congressionally designed remedial schemes of such statutes by the precedent of this case would not be overruled by state judiciaries, thereby frustrating the entire design of the federal employment law and the Constitution.

PART II

With respect to syllabus 2 and 3:

2). R.C. 4123.52 does not preempt a common law cause of action against an employer who discharges or disciplines an employee in violation of that statute.

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[2]These statutes are not filed in the appendix hereto as not requiring interpretation for this reconsideration. They are cited to give context to the syllabus.

3). An employee who is discharged or disciplined in violation of the public policy embodied in R.C. 4113.52 may maintain a common law cause of action against the employer pursuant to Greeley v. Miami Valley Maintenance Contrs., Inc. (1990), 49 Ohio St. 3d 228, 551 N.E. 2d 981, and its progeny, so long as that employee has fully complied with the statute and was subsequently discharged or disciplined (Greeley, supra approved; Painter v. Graley (1994), 70 Ohio St. 3d 377, 639 N.E. 2d 251, paragraphs 2 and 3 of the syllabus approved; Phung v. Waste Mgt., Inc. (1986), 23 Ohio St. 3d 100, 23 OBR 260, 291 N.E. 2d 1114, overruled).

APPELLEE'S GROUND FOR RECONSIDERATION NO. 2

Remand of statutory and common law action based on R.C. 4113.52(A)(2) conflicts with federal law.
(As to syllabi 2 and 3).

The ground for reconsideration for the Greeley cause of action predicated on OSHA applies with equal force to both the statutory claim under R.C. 4113.52(A)(2) and the Greeley cause of action predicated upon it. That statute clearly requires filing with the prosecuting authorities of certain state environmental crimes. However, this Court in permitting remand stated: "In the case at bar, Appellant continues to have a viable claim for whistleblower protection, since he arguably complied with R.C. 4113.52(A)(2) in reporting matters to OSHA. Thus, to the extent that he complied with R.C. 4113.52, Appellant has established a firm foundation for a Greeley claim for wrongful discharge in violation of public policy embodied in the Whistleblower Statute." Kulch at 154. Arguments concerning the viability of the underlying statutory claim of R.C. 4113.52(A)(2) were directed to be heard on remand. Id. At 158. Nonetheless, this Court's remarks that filing with OSHA can be

considered under that statute despite the explicit listing by the legislation, should be reconsidered on the same basis as the foregoing section.

To read the list of Ohio environmental statutes in R.C. 4113.52(A)(2) and to remand the question of whether or not filing with OSHA is a reasonable step to invoke those statutes is blatantly contrary to the purposes of OSHA as set forth above. "Nothing in this Act [OSHA] shall...enlarge, diminish, or affect in any other manner...statutory rights or duties or liabilities of employers with respect to injuries...arising out of or in the course of employment." 29 U.S.C. §653(b)(4). Winking at the list of state laws in R.C. 4113.52(A)(2) and saying that OSHA may be reasonably connected therewith is no doubt an enlargement of state statutory employment law for redress of injuries contemplated in 29 U.S.C. §651(a). As set forth above, Congress has identified how OSHA, including its non-discrimination clause, may be incorporated into state law, and Ohio has not done so. 29 U.S.C. §667(c)(2), 29 C.F.R. §1902.3(b) and §1902.4(c)(2)(v) and §1954.3(e). Again, the majority has set up a conflict with federal law by interpreting state statute (to include it although never mentioned therein) and incorporating it into the state common law. The consequences of allowing remand for proof of whether OSHA is reasonably a filing under the state environmental statutes ought to be examined. Are property owners and employers responsible for notice of the environmental law by OSHA filings? Is that Constitutional notice? Is it Constitutional notice for a violation of R.C. 4113.52?

APPELLEE'S GROUND FOR RECONSIDERATION NO. 3

Overruling Phung, supra destroys the basis for a Greeley public policy tort and does not change the historical fact of its role in the legislative intent behind R.C. 4113.52 and should be rescinded.

(As to syllabi 2 and 3.)

[11]

The majority's opinion has failed to appreciate that Phung is the wellspring both of the legislative enactment of R.C. 4113.52 and the recognition of the public policy tort exception in Greeley, supra.

After the discussion of the statutes involved in the Greeley facts, the Court addressed that Appellant's request for a common law cause of action by virtue of the violation of the public policy. The Appellee in Greeley defended with Phung, but this Court disagreed:

> In Phung, we held that public policy does not require that there be an exception to the employment at-will doctrine, absent a sufficiently clear public policy warranting the creation of a cause of action. (Id. At 102, 23 O.B.R. at 262, 491 N.E. 2d at 1116-1117). (Emphasis added.)

After that single citation, the Court concluded that it is time for Ohio to join the states recognizing the public policy exception and entered its holding at the same page 234:

> Therefore we hold that public policy warrants an exception to the employment at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute.

The Court then went to apologetics demonstrating that the holding, which sprung out of citation to Phung, is not a new creature in the common law by reference to Hazlett v. Martin Chevrolet, Inc. (1986), 25 Ohio St. 3d 729, 25 O.B.R. 331, 496 N.E. 2d 478 and Fawcett v. G.C. Murphy & Co. (1976), 46 Ohio St. 2d 245, 75 O.O. 2d 291, 348 N.E. 2d 144. The Court returned to citing Phung for the proposition that employment at-will in Ohio is alive and well and "without more clearly at-will. Such a relationship permits termination of employment for no cause for any cause which is not unlawful at any time and regardless of motive." Id. See also Phung, supra." (emphasis in original.)

[12]

Thus, it is on the basis of Phung observing that the at-will doctrine has limitations in the law and public policy that the Court reached the decision in Greeley. Phung at the portion cited, observed that either party to an oral at-will agreement may terminate employment relationship for any reason which is not contrary to law. It then proceeded to observe that Ohio had not recognized public policy exceptions, but also said that the case sub judice would not create such a cause of action because there was no public policy in the common law supporting the concept of whistleblowing. Phung was prepared to take the step Greeley did, but was frustrated by the absence of a public policy ground.

Phung's reasoning that at-will employment is limited by violation of law is the source of Greeley. Phung's finding that no common law whistleblower protection exists is the source of the statute. These twin branches of Greeley and R.C. 4113.52 grow out of the Phung tree. The statutory branch bore the fruit of a remedy for employees. However, the Greeley branch bore no such fruit based on the case law interpreting Phung in light of R.C. 4113.52. Now Kulch majority has commanded that the Greeley branch bear the fruit of a public policy tort remedy based on R.C. 4113.52 and then cut down the Phung tree by overruling it. Where does that leave Ohio's law? By overruling Phung, the common law basis for the Greeley cause of action has disappeared in the recognition of a Greeley whistleblower cause of action. Notwithstanding the syllabus, history cannot be revised by the overruling of Phung. The whistleblower statute was enacted in response to the Phung decision which cannot be changed by judicial fiat otherwise the General Assembly has been duped into providing a statutory remedy when a remedy was not needed.

The wholesale and the illogical disregard of precedent does no honor to the Court. A court's obligation, with respect to stare decisis, was outlined in Planned Parenthood v. Casey (1992), 505 U.S. 883, 112 S. Ct. 2791 at 854:

> The obligation to follow precedent begins with necessity, and contrary necessity marks its outer limit. With Cardozo we recognize that no judicial

> system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed. (Citations omitted.)

The Court observed that stare decisis is not an "inexorable command" and proceeds to outline how a court should re-examine a prior holding:

> Rather than when this Court re-examined a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of affirming and overturning a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply be defying practical workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of an abandoned doctrine; or whether the facts have so changed or come to be seen so differently, as to have robbed the old rule of its application or justification.
>
> So it is in this case that we may enquire whether Roe's central rule has been found unworkable; whether the rule's limitation on state power could

> be removed without serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it; whether the law's growth in the intervening years has left Roe's central rule a doctrinal anachronism discounted by society; and whether Roe's premises of fact have so far changed in the ensuing two decades as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue addressed. (Citations omitted.)

It is clear that Phung is not unworkable and overruling it is not a necessity. The Legislature adequately responded to the absence of common law whistleblower protection by giving a remedy. Furthermore, the reliance on Phung, not only by the General Assembly but the judiciary and others indicates serious inequity in overruling it. The majority alludes to only a few cases in its decision that rely on Phung Kulch at page 159. In fact, the Court of Appeals of virtually every district in the state were disavowed by the majority.[3] Phung is not a doctrinal anachronism but part of the fabric of the history and law of whistleblowing protection. The intervening events of R.C. 4113.52 and the

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[3]Bear v. Geetronics, inc. (1992), 83 Ohio App., 163 at 167; Bushman v. Mid Ohio Regional Planning Commission, (Dec. 7, 1995) Franklin App. No. 95APE03-249 unreported, 1995 W.L. 723546; Cisneros v. Birck, (April 11, 1995) Franklin App. No. 94APP 08-1255, unreported, 1995 W.L. 222156; Contreras v. Ferro Corp., et al., (October 28, 1993), Cuyahoga App. No. 64394/64424/64883, unreported; Contreras v. Ferro Corporation, et al., (1995) 73 Ohio St. 3d 244; Murray v. Clinton Petroleum Company, (July 16, 1993) Portage App. No. 92-P-0086 unreported; Rayel v. Wackenhut Corp., (June 8, 1995), Cuyahoga App. No. 67459, 1995 W.L. 350077; Rheinecker v. Forest Laboratories, Inc., (S.D. Ohio 1993) at 13 F.Supp. 256 recon. Den. 826 F.Supp. 256; Russell v. General Electric Co., (January 14, 1994), S.D. Ohio No. C-1-92-343 (unreported) adopted February 23, 1994; Ungrady v. Burns Intern. Sec. Services, Inc., (N.D. Ohio 1991), 767 F.Supp. 849.

Greeley decision have made it not less but more relevant.[4]

Posit the consequences of confusion sown by this decision. If Phung is a dead letter, is there now a common law protection whistleblowing? (That would be a surprise to Dr. Phung.) If so, with what parameters? Is it the same as the statute? If so, why?: That would be a surprise to the General Assembly and to all the litigants and judges involved in all the cases disavowed in the wake of overruling Phung. What if R.C. 4113.52 were repealed? What if it were amended? Would the legislature be amending the common law? Is there jurisprudential foundation for Greeley any longer or is it to be justified by its progeny rather than antecedents. That is the antithesis of stare decisis and nonexistent in the common law.

Obviously, Phung should not be overruled. The concern that propelled that unfortunate choice, that the legislative remedy was created out of an absence of common law and is exclusive, must be reinstated with the consequence that R.C. 4113.52 is as a matter of historical fact and law, is the exclusive remedy of the wrong.

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[4]Hubris in face of stare decisis is transparent in the dictum that at-will employment was judicially created and can be judicially abolished. Kulch at 161. At-will employment is so thoroughly a part of American commercial culture that the inequity factor cannot be gainsaid. Moreover, every state and the United States has enacted statutes predicated on the existence of the common law at-will doctrine. The basis of each statute is the concept that, absent its prohibitions, the at-will rule prevails and that only by its Legislative enactment can protection sought to be obtained. The majority takes it upon itself to assume that a judiciary would overturn the huge jurisprudence based on that doctrine as well as the societal reliance upon it that is alive and continuing without considering the consequence.

[16]

APPELLEE'S GROUND FOR RECONSIDERATION NO. 4

The remand of a public policy tort action and statutory absence predicated on R.C. 4113.52(A)(2) fails to apply the rigor of strict compliance with the underlying statute as enunciated in the syllabus.

(As to syllabi 2 and 3.)

The majority repeatedly held that to maintain a public policy tort cause of action under Greeley predicated on a statute, there must be strict compliance with the underlying statute. (Syllabus 3 ... "so long as the employee has fully complied with this statute"; "The fact that Appellant reported to OSHA without having notified his employer both oral and in writing concerning the alleged health and safety violations is fatal to his claim for protection under R.C. 4113.52(A)(1)(a)"; Kulch at 142, reaffirming Contreras:[5] "...an employee who fails to strictly comply with the requirements of R.C. 4113.52 cannot base a Greeley claim solely upon public policy embodied in that statute." Kulch at 153.)

Although strict compliance is required, the Court illogically allows remand of a cause of action under Greeley and the statute based upon R.C. 4113.52(A)(2). That statute inter alia requires notifying the prosecuting authorities of certain state law environmental crimes. The only filing that the plaintiff made was with OSHA, as has been repeatedly conceded to this Court and to others, and not to the prosecuting authorities of the listed statutes. The Court said he should have strictly complied, yet this Court is allowing a remand. The Court should have found that as matter of law OSHA is not a state law and OSHA is not one of the listed environmental statutes issued and that strict compliance means strict compliance.

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[5]Contreras v. Ferro Corporation (1995), 73 Ohio St. 3d 344, 652 N.E. 2d 940 syllabus.

[17]

The Court misinterprets the circumstances in light of Fox v. Bowling Green (1996), 76 Ohio St. 3d 534, 668 N.E. 2d 898 in which the Court observed that a "reasonable belief" standard is the only acceptable interpretation of the whistleblowers statute. That is a standard for whether or not a criminal violation occurred. Obviously, an employee cannot be charged with the niceties of statutory interpretation and should not be required to be infallible about whether a violation occurred. However, the instant situation involves another question, not only whether he reasonably believed the state statutes listed in R.C. 4113.52(A)(2) were violated, but whether he took the appropriate steps of going to the state prosecuting authority for those statutes. It is conceded he did not.[6] This Court should have found therefore in addition to OSHA not being a state environmental statute as a matter of law, that the plaintiff conceded that he did not strictly comply with the statutory requirements so as to create the cause of action either under the statute or under the public policy exception.

Secondly, the "reasonable belief" rigor was not applied in the majority's finding of an OSHA-Greeley cause of action predicated on §11(c) of OSHA. The plaintiff strictly complied with that statute by filing with the Department of Labor. An investigation ensued concluding with a dismissal. Since the federal agency charged with the investigation and prosecution of §11(c) discrimination concluded that there was no statutory violation, then 1) strictly speaking there is no violation of §11(c) upon which a Greeley cause of action can be predicated and 2) Appellant has the grounds to "reasonably believe" there is a violations once OSHA

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[6]The summary judgment standard was satisfied whereby Appellees presented all affirmative evidence below that Appellant did not make a prima facia case under the entire statute. The affirmative evidence is the only public filing, OSHA, which is fully spread on the record. Cf dissent per Cook, J. At 169 ff. The negative evidence that Appellant admitted he did not file elsewhere was contained in the deposition of Appellant. A copy of that page submitted to the Appellate Court. Appellee's Motion to the trial court referred to the depositions. Cf Motion for Summary Judgment footnote page 2.

tells him there is not, unless he holds expertise greater than OSHA. If strict compliance is expected of every statute upon which the public policy tort is predicated, then it should be as well for §11(c). When the administrative authority has been exhausted as it was here in a conclusive fashion establishing that no violation occurred, then there is no violation of the public policy that is so necessary for a Greeley cause of action.

PART III

With respect to syllabi 4 and 5:

4). The remedies available pursuant to R.C. 4113.52 for violations of the statute and remedies available for the tort of wrongful discharge are cumulative.

5). An at-will employee was discharged or disciplined in violation of R.C. 4113.52 may maintain a statutory cause of action for the violation, a common law cause of action in tort, or both but is not entitled to double recovery.

APPELLEE'S GROUND FOR RECONSIDERATION NO. 5

In addition to prior grounds for reconsideration, Constitutional concerns of the separation of powers under the republican form of government that guarantees due process and equal protection require reconsideration of the decision on the merits.

(As to all syllabi.)

To the extent that these remedial syllabi relate to the others, the same grounds for reconsideration apply to them as previously enunciated. The following is offered in addition.

[19]

The guaranty of the republican form of government, Constitution of the United States, Article IV, Section 4, includes the concept of the separation of powers in state government. At some juncture, whether this case or some future case, the activisim exhibited in the judiciary exemplified by the history of the public policy exception in Ohio law will be viewed for what it is:

> This decision by the majority is a troubling instance of this Court elevating itself above the General Assembly as architect of Ohio's public policy. Rather than interpreting the Whistleblower Statute, the majority cites its own policy for the state based on the view of four Justices that the statutory relief, as crafted by the branch of government charged with that decision, is not "ample [or] complete." The majority because it disagrees with the legislative decisions to limit remedies provided in the state and federal statutes acts beyond this Court's constitutional authority to remedy the perceived short-comings. Kulch dissent by Cook, J. at 164.

The dissent may have been referring to the separation of powers of the Ohio Constitution. However, separation of powers in state governments is inherent in the federal Constitution. A judiciary that presumes to legislate so blatantly affronts the separation of powers inherent in the republican form of government on which derivative rights like constitutional due process and equal protection depend. Constitution of United States Amendment 14. It is respectfully submitted that this decision be reconsidered and that the Court retreat from the brink of excess judicial activisim in constituting itself into a super legislature, superior even to Congress.

CONCLUSION

For the foregoing reasons, the decision and all of its syllabi should be reconsidered and with or without rehearing.

ROETZEL & ANDRESS

/s/_____

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[21]

CERTIFICATE OF SERVICE

A copy of the foregoing has been sent by ordinary mail, postage prepaid to Patrick J. Perotti, #0005481, DWORKEN & BERNSTEIN CO., L.P.A., 153 East Erie Street, #304, Painesville, Ohio 44077, Attorneys for Plaintiff-Appellants 26th day of April, 1997.

/s/_____
Gregory P. Szuter

APPENDIX C

No. 95-650
1997 Term

THE SUPREME COURT OF OHIO

FILED
April 16, 1997
Marcia Mengel, Clerk
Supreme Court of Ohio

JAMES KULCH, *Appellant*,	)	**JUDGMENT ENTRY**
v.	)	
STRUCTURAL FIBERS, INC., et al *Appellees.*	)	**APPEAL FROM THE COURT OF APPEALS**

This cause, here on appeal from the Court of Appeals for Geauga County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed in part, reversed in part, and the cause is remanded to the trial court for further proceedings, consistent with the opinion rendered herein.

It is further ordered that the parties are to bear their respective costs herein expended; and that a mandate be sent to the Court of Common Pleas for Geauga County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk

of the Court of Appeals for Geauga County for entry.

COSTS:

Docket Fee, $40.00, paid by Dworken & Bernstein.

(Geauga County Court of Appeals; No. 93G1824)

/s/_____
THOMAS J. MOYER
Chief Justice

Kulch v. Structural Fibers, Inc. et al.
78 Ohio St.3d 134, 677 N.E.2d 308

KULCH, Appellant,
v.
STRUCTURAL FIBERS, INC. Et al., Appellees.
No. 95-650.

Supreme Court of Ohio.

Submitted Oct. 8, 1996.

Decided April 16, 1997.

Former employee sued former employer for violations of Ohio's whistleblower statute, wrongful discharge in violation of public policy, and negligent and intentional infliction of emotional distress. The Court of Common Pleas, granted employer's motion for judgment on the pleadings and summary judgment. Former employee appealed. The Court of Appeals, Geauga County, 1995 WL 89963, affirmed. The Supreme Court, Douglas, J., allowed discretionary appeal, and held that: (1) former employee's failure to notify employer in writing of alleged health and safety violations precluded employee from recovery under whistleblower statute; (2) former employee did not abandon whistleblower claim based on reporting suspected criminal violations of environmental laws, and had no obligation to respond to employer's summary judgment motion on that claim; (3) former employee could maintain a common-law tort action against the employer for wrongful discharge/discipline in violation of public policy, overruling Phung v. Waste Mgt., Inc.; and (4) employee who is discharged or disciplined in violation of whistleblower statute may maintain statutory cause of action for the violation, common-law cause of action in tort, or both, but is not entitled to double recovery.

Affirmed in part; reversed in part; and remanded.

Pfeifer, J., filed opinion concurring in syllabus and

judgment only.

Moyer, C.J., Cook and Lundberg Stratton, JJ., dissented in part and concurred in part.

Cook, J., filed opinion in which Moyer, C.J., and Lundberg Stratton, J., concurred.

[1] MASTER AND SERVANT - 30(6.15)
255K30(6.15)
Employee's failure to notify employer in writing of alleged health and safety violations precluded recovery under whistleblower statute, even though employee orally notified employer of claimed health and safety violations, employer failed to address employee's concerns, employee reported alleged violations to Occupational Safety and Health Administration (OSHA), and was subsequently discharged. (Per Douglas, J., with two Justices concurring and one Justice concurring in the judgment.) R.C. §§4113.52, 4113.52(A)(1)(a).

[1]MASTER AND SERVANT-30(6.35)
255K30(6.35)
Employee's failure to notify employer in writing of alleged health and safety violations precluded recovery under whistleblower statute, even though employee orally notified employer of claimed health and safety violations, employer failed to address employee's concerns, employee reported alleged violations to Occupational Safety and Health Administration (OSHA), and was subsequently discharged. (Per Douglas, J., with two Justices concurring and one Justice concurring in the judgment.) R.C. §§4113.52, 4113.52(A)(1)(a).

[2]APPEAL AND ERROR-223
30k223
Employee did not abandon whistleblower claim based on reporting

suspected criminal violations of environmental laws, even though he failed to defend it on employer's motion for summary judgment, as he specifically asserted claim in complaint, and employer did not attack that claim in summary judgment motion. (Per Douglas, J., with two Justices concurring and one Justice concurring in the judgment.) R.C. §§ 3704.01 et seq., 3734.01 et seq., 4113.52(A)(2), 6109.01 et seq., 6111.01 et seq.

[2]JUDGMENT-183
228K183
Employee did not abandon whistleblower claim based on reporting suspected criminal violations of environmental laws, even though he failed to defend it on employer's motion for summary judgment, as he specifically asserted claim in complaint, and employer did not attack that claim in summary judgment motion. (Per Douglas, J., with two Justices concurring and one Justice concurring in the judgment.) R.C. §§ 3704.01 et seq., 3734.01 et seq., 4113.52(A)(2), 6109.01 et seq., 6111.01 et seq.

[3]MASTER AND SERVANT-30(6.15)
255K30(6.15)
Employee may directly notify any appropriate public official or agency of perceived statutory violations, without notifying employer, where employee becomes aware in the course of his or her employment of violation of Air Pollution Control Act, Solid and Hazardous Wastes Act, Safe Drinking Water Act (SDWA), or Water Pollution Control Act, that is a criminal offense. (Per Douglas, J., with two Justices concurring and one Justice concurring in the judgment.) R.C. §§3704.01 et seq., 3734.01 et seq., 4113.52(A)(2), 6109.01 et seq., 6111.01 et seq.

[4]MASTER AND SERVANT-30(6.15)
255k30(6.15)
At-will employee who is discharged or disciplined for filing a

complaint with Occupational Safety and Health Administration (OSHA) concerning matters of health and safety in the workplace is entitled to maintain a common-law tort action against the employer for wrongful discharge/discipline in violation of public policy, overruling Phung, supra, 23 Ohio St.3d 100, 23 OBR 260, 491 N.E.2d 1114. Occupational Safety and Health Act of 1970, § 2 et seq., 29 U.S.C.A. § 651 et seq.; R.C. §§ 3704.01 et seq., 3734.01 et seq., 4113.52.

[5]MASTER AND SERVANT-30(1.10)
255K30(1.10)
Elements of cause of action for tortious wrongful discharge in violation of public policy are that: clear public policy existed and was manifested in Constitution, statute or administrative regulation, or in the common law (clarity element); dismissing employees under such circumstances would jeopardize public policy (jeopardy element); plaintiff's dismissal was motivated by conduct related to the public policy (causation element); and employer lacked overriding legitimate business justification for dismissal (overriding justification element). (Per Douglas, J., with two Justices concurring and one Justice concurring in the judgment.)

[6]MASTER AND SERVANT-43
255k43
Clarity and jeopardy elements of tort of wrongful discharge in violation of public policy are questions of law to be determined by the court. (Per Douglas, J., with two Justices concurring and one Justice concurring in the judgment.)

[7]MASTER AND SERVANT-43
255k43
Causation and overriding justification elements of tort of wrongful discharge in violation of public policy are questions of fact for the trier-of-fact. (Per Douglas, J., with two Justices concurring and one Justice concurring in the judgment.)

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[8]MASTER AND SERVANT-30(6.15)
255k30(6.15)
Public policy expressed in Occupational Safety and Health Act's (OSHA's) provision that employers may not retaliate against employees who file Occupational Safety and Health Administration (OSHA) complaints, justified exception to employment-at-will doctrine and supported cause of action for wrongful discharge in violation of public policy. Occupational Safety and Health Act of 1970, §11(c), 29 U.S.C.A. § 660(c). (Per Douglas, J., with two Justices concurring and one Justice concurring in the judgment.)

[8]MASTER AND SERVANT-30(6.35)
255k30(6.35)
Public policy expressed in Occupational Safety and Health Act's (OSHA's) provision that employers may not retaliate against employees who file Occupational Safety and Health Administration (OSHA) complaints, justified exception to employment-at-will doctrine and supported cause of action for wrongful discharge in violation of public policy. Occupational Safety and Health Act of 1970, §11(c), 29 U.S.C.A. § 660(c). (Per Douglas, J., with two Justices concurring and one Justice concurring in the judgment.)

[9]MASTER AND SERVANT-30(6.35)
255K30(6.35)
Public policy expressed in whistleblower statute justified exception to employment at-will doctrine and supported wrongful discharge in violation of public policy cause of action. R.C. § 4113.52(A)(2). Per Douglas, J., with two Justices concurring and one Justice concurring in the judgment.)

[10]MASTER AND SERVANT-30(6.35)
255k30(6.35)
In order for an employee to be afforded protection as a "whistleblower," such employee must strictly comply with dictates of whistleblower statute. R.C. § 4113.52. (Per Douglas, J., with

two Justices concurring and one Justice concurring in the judgment.)

[11]MASTER AND SERVANT-3-0(6.35)
255k30(6.35)
Employee who fails to strictly comply with whistleblower statute cannot base claim for tortious wrongful discharge in violation of public policy solely upon public policy embodied in that statute. R.C. § 4113.52. (Per Douglas, J., with two Justices concurring and one Justice concurring in the judgment.)

[12]MASTER AND SERVANT-30(6.35)
255k30(6.35)
Whistleblower statute does not preempt common-law cause of action against employer who discharges or disciplines employee in violation of that statute. R.C. § 4113.52

[13]MASTER AND SERVANT-30(6.35)
255k30(6.35)
At-will employee who is discharged or disciplined in violation of the public policy embodied in whistleblower statute may maintain common-law wrongful discharge in violation of public policy cause of action against employer so long as employee fully complied with statute and was subsequently discharged or disciplined. R.C. § 4113.52.

[14]MASTER AND SERVANT-35
255k35
Remedies available for violations of whistleblower statute and remedies available for tort of wrongful discharge are cumulative. R.C. § 4113.52.

[15]MASTER AND SERVANT-35
255k35
At-will employee who is discharged or disciplined in violation of

whistleblower statute may maintain statutory cause of action for the violation, common-law cause of action in tort, or both, but is not entitled to double recovery. R.C. § 4113.52.

Syllabus by the Court

***134** 1. An at-will employee who is discharged or disciplined for filing a complaint with the Occupational Safety and Health Administration concerning matters of health and safety in the workplace is entitled to maintain a common-law tort action against the employer for wrongful discharge/discipline in violation of public policy pursuant to Greeley v. Miami Valley Maintenance Contrs., Inc. (1990), 49 Ohio St.3d 228, 551 N.E.2d 981, and its progeny.

2. R.C. 4113.52 does not preempt a common-law cause of action against an employer who discharges or disciplines an employee in violation of that statute.

3. An at-will employee who is discharged or disciplined in violation of the public policy embodied in R.C. 4113.52 may maintain a common-law cause of action against the employer pursuant to Greeley v. Miami Valley Maintenance Contrs., Inc. (1990), 49 Ohio St.3d 228, 551 N.E.2d 981, and its progeny, so long as that employee had fully complied with the statute and was subsequently discharged or disciplined. (Greeley, supra, approved; Painter v. Graley [1994], 70 Ohio St.3d 377, 639 N.E.2d 51, paragraphs two and three of the syllabus, approved; Phung v. Waste Mgt., Inc. [1986], 23 Ohio St.3d 100, 23 OBR 260, 491 N.E.2d 1114, overruled.)

4. The remedies available pursuant to R.C. 4113.52 for violations of the statute and the remedies available for the tort of wrongful discharge are cumulative.

5. An at-will employee who is discharged or disciplined in violation of R.C. 4113.52 may maintain a statutory cause of action for the violation, a common-law cause of action in tort, or both, but is not entitled to double recovery.

***135** Structural Fibers, Inc., appellee, is an operation division of appellee ESSEF Corporation. Structural Fibers is located in Chardon, Ohio, where it manufactures tanks or "vessels" used in well water systems. In 1976, James Kulch, appellant, was hired by Structural Fibers as a factory worker. In late 1990, Kulch began experiencing serious health problems which he believed were attributable to toxic chemicals in the air at his workplace. Other employees had also experienced health problems, such as serious allergic reactions, rashes, bloody noses, skin irritation, and respiratory difficulties. Therefore, Kulch and others verbally complained to management concerning the situation. However, according to Kulch, management responded to his complains by informing him hat he could either do his job or find employment elsewhere.

In January 1991, after Structural Fibers had done nothing in response to Kulch's verbal complaints, Kulch filed a written report with the Occupational Safety and Health Administration ("OSHA"). In his report, Kulch stated that employees in the "winding area" of Structural Fibers' main plant were complaining of health problems "from chemicals in the air, such as: acetone, styrene, epoxy resins, cobalt [sic] mixes." In April 1991, OSHA inspected the plant and, among other things, performed air monitoring in the winding area. The air sampling data revealed that the air contaminants in the winding area did not violate OSHA standards. However, during the on-site inspection, OSHA found several serious violations of the Occupational Safety and Health Act of 1970, Section 651 et seq., Title 29, U.S.Code. Consequently, substantial fines were assessed against Structural Fibers. [FN1] The violations found by OSHA were apparently unrelated to the matters set forth in Kulch's January 1991 OSHA complaint.

> FN1. The fines imposed by OSHA were later reduced under the terms of a settlement agreement between OSHA and Structural Fibers.

According to Kulch, Structural Fibers and the ESSEF Corporation (collectively, "appellees") retaliated against him for having filed the report with OSHA. Specifically, Kulch's ****311** coworkers were approached by management and asked to confirm the identify of the person who had filed the OSHA complaint. At the same time, appellees warned employees not to associate with Kulch. Appellees threatened that anyone found associating with Kulch would "go down" with him. On one occasion, Kulch was physically threatened by a supervisor for having reported the company to OSHA. Additionally, Kulch's supervisors began filling his employment file with lengthy write-ups and entries. Between June 7 and ***136** October 7, 1991, write-ups or reports had been placed in Kulch's personnel file on eleven separate occasions, sometimes more than once on the same day.

In October 1991, management at Structural Fibers decided to secretly videotape Kulch during work hours to monitor his job performance. A hidden camera was placed near Kulch's work station and his performance was surveyed over a period of two days. The act of videotaping Kulch was the first time in company history that surveillance cameras were used to document an employee's job performance. On October 17, 1991, Kulch was discharged from his employment with Structural Fibers. Following the discharge, Kulch filed a complaint with OSHA, asserting that appellees had discharged him for having filed previous OSHA complaints. In July 1992, OSHA dismissed Kulch's retaliation complaint.

The parties dispute the reason for Kulch's termination. Kulch contends that he was discharged from his employment in reprisal for having reported Structural Fibers to OSHA. Conversely, appellees specifically deny having ever retaliated against Kulch. Appellees claim that they videotaped Kulch and

began to closely monitor his job performance simply because Kulch had been suspected of improperly performing his job. Appellees maintain that they never knew about Kulch's January 1991 OSHA complaint until well after the complaint had been filed. Appellees claim that Kulch was terminated for failure to properly perform his job and for falsely indicating on his time card that he had performed work he had not in fact completed.

In December 1991, Kulch filed suit against Structural Fibers. In an amended complaint, Kulch added appellee ESSEF Corporation as a defendant and set forth claims for violations of Ohio's Whisleblower Statute, R.C. 4113.52, and wrongful discharge in violation of public policy. Kulch also set forth claims for, among other things, negligent and intentional infliction of emotional distress. On May 15, 1992, appellees moved to dismiss the amended complaint for failure to state a claim. The trial court denied appellees' motion to dismiss. Thereafter, following a period of discovery, appellees moved for summary judgment on Kulch's claims for violations of the Whistleblower Statute and his claims for negligent and intentional infliction of emotional distress. Appellees also moved for judgment on the pleadings with respect to, among other things, Kulch's claim of wrongful discharge in violation of public policy. By judgment entry filed November 10, 1993, the trial court granted appellees' motion for judgment on the pleadings and for summary judgment, stating:

"This case is before the court on defendants' motion for judgment on the pleadings and for summary judgment.

"Plaintiff seeks to recover damages for wrongful discharge pursuant to the Whistleblower Act, R.C. 4113.52. Plaintiff reported to [OSHA] that the defendant[s'] work place was unsafe because defendant[s] permitted the use and *137 discharge into the air of toxic and corrosive chemicals. Defendant[s] [claim] that plaintiff was discharged, not for whistleblowing, but for unsatisfactory work performance. For the purposes of this motion, the court must assume that defendant[s] discharged plaintiff because plaintiff reported defendant[s] to OSHA.

"In addition to a violation of the Whistleblower Act, plaintiff alleges that his discharge was unlawful and in conflict with Ohio's public policy as established in Greeley v. Miami Valley Maintenance Contractors, Inc. (1990), 49 Ohio St.3d 228 [551 N.E.2d 981]. First, the court is of the opinion that the Whistleblower Act in Ohio has preempted this field so that * * * a public policy exception to the employment at will doctrine does not exist in Ohio for whistleblowing. * * *

**312 "As to the violations of the Whistleblower Statute, R.C. 4113.52 specifically provides that an employee must first give oral and written notice to the employer in order to be protected by the statute. It is undisputed in this case that plaintiff orally complained to the employer about the unsafe or unhealthy condition in the plant, but that he never made a written complaint to the employer.

"* * *"Accordingly, the court holds that plaintiff is not afforded protection pursuant [to] R.C. 4113.52 and that no genuine issue exists as to any material fact and that judgment should be granted as a matter of law with respect to the claimed violation of statute.

"* * *"Finally, plaintiff claims that he suffered emotional distress because of defendant[s'] intentional and negligent actions. Construing the facts most favorably for the plaintiff, the court concludes that defendant[s'] conduct was neither extreme nor outrageous.

"Accordingly, the court grants defendant[s'] motion for summary judgment and finds for defendant[s] on the complaint."

On appeal, the court of appeals affirmed the judgment of the trial court. With respect to Kulch's claim of wrongful discharge in violation of public policy, the court of appeals agreed with the trial court's determination that R.C. 4113.52 preempts the formation of a public-policy exception to the employment-at-will doctrine within the specific context of whistleblowing. The court

of appeals also agreed with the trial court's decision granting summary judgment in favor of appellees on Kulch's statutory whistleblower cause of action, finding that Kulch was not entitled to avail himself of the protections of R.C. 4113.52(A)(1)(a) because he never made a written report to his employer concerning the alleged unsafe or unhealthy condition of his workplace. Additionally, the court of appeals ***138** upheld the grant of summary judgment in favor of appellees on the claims for negligent and intentional infliction of emotional distress.

The cause is now before this court pursuant to the allowance of a discretionary appeal.

Dworken & Bernstein Co., L.P.A., Patrick J. Perotti, Robert J. Hoffman and Shawn W. Maestle, Painesville, for appellant.

Roetzel & Andress, and Gregory P. Szuter, Cleveland, for appellees.

Louis A. Jacobs; Spater, Gittes, Schulte & Kolman and Frederick M. Gittes, Columbus, urging reversal for amici curiae, Ohio Employment Lawyers Association; Ohio NOW Education and Legal Fund; National Conference of Black Lawyers, Columbus Chapter; and Police Officers for Equal Rights.

DOUGLAS, Justice.

This appeal presents three main issues for our consideration. The first is whether the court of appeals erred in finding that appellees were entitled to summary judgment on Kulch's statutory cause of action for violations of R.C. 4113.52, Ohio's Whistleblower Statute. [FN2] The second concerns the court of ***139** appeals' determination that R.C. 4113.52 preempts the formation of an independent common-law cause of action in tort for an at-will employee who is discharged or ****313** disciplined for "whistleblowing." The third involves the question whether the ***140** court of appeals erred in affirming the grant of summary judgment in favor of appellees on Kulch's claims for negligent and intentional infliction of emotional distress. For the reasons that follow, we affirm the judgment of the court of appeals in part,

reverse it in part, and remand this cause to the trial court for further proceedings.

FN2. R.C. 4113.52 provides that: "(A)(1)(a) If an employee becomes aware in the course of his employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that his employer has authority to correct, and the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, the employee orally shall notify his supervisor or other responsible officer of his employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification or the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation where the violation occurred, with a peace officer, with the inspector general if the violation is within his jurisdiction, or with any other appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which he is engaged. "(b) If an employee makes a report under division (A)(1)(a) of this section, the employer, within twenty-four hours after the oral notification was made or the report was received or by the close of business on the next regular business day following the day on which the oral notification was made or the report was received, whichever is later, shall notify the employee, in writing, of any effort of the employer to correct the alleged violation or hazard or of the absence of the alleged violation or hazard.

"(2) If an employee becomes aware in the course of his employment of a violation of Chapter 3704., 3734., 6109., or 6111. Of the Revised Code that is a criminal offense, the employee

directly may notify, either orally or in writing, any appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which he is engaged. "(3) If an employee becomes aware in the course of his employment of a violation by a fellow employee of any state or federal statute, any ordinance or regulation of a political subdivision, or any work rule or company policy of his employer and the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, the employee orally shall notify his supervisor or other responsible officer of his employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. "(B) Except as otherwise provided in division (c) of this section, no employer shall take any disciplinary or retaliatory action against an employee for making any report authorized by division (A)(1) or (2) of this section, or as a result of the employee's having made any inquiry or taken any other action to ensure the accuracy of any information reported under either such division. No employer shall take any disciplinary or retaliatory action against an employee for making any report authorized by division (A)(3) of this section if the employee made a reasonable and good faith effort to determine the accuracy of any information so reported, or as a result of the employee's having made any inquiry or taken any other action to ensure the accuracy of any information reported under that division. For purposes of this division, disciplinary or retaliatory action by the employer includes, without limitation, doing any of the following: "(1) Removing or suspending the employee from employment; "(2) Withholding from the employee salary increases or employee benefits to which the employee is otherwise entitled; "(3) Transferring or reassigning the employee; "(4) Denying the employee a promotion that otherwise would have been received; "(5) Reducing the employee in pay or position. "(C) An employee shall make a reasonable and good faith effort to

determine the accuracy of any information reported under division (A)(1) or (2) of this section. If the employee who makes a report under either division fails to make such an effort, he may be subject to disciplinary action by his employer, including suspension or removal, for reporting information without a reasonable basis to do so under division (A)(1) or (2) of this section. "(D) If an employer takes any disciplinary or retaliatory action against an employee as a result of the employee's having filed a report under division (A) of this section, the employee may bring a civil action for appropriate injunctive relief or for the remedies set forth in division (E) of this section, or both, within one hundred eighty days after the date the disciplinary or retaliatory action was taken, in a court of common pleas in accordance with the rules of civil procedure. A civil action under this division is not available to an employee as a remedy for any disciplinary or retaliatory action taken by an appointing authority against the employee as a result of the employee's having filed a report under division (A) of the section 124.341 of the Revised Code. "(E) The court, in rendering a judgment for the employee in an action brought pursuant to division (D) of this section, may order, as it determines appropriate, reinstatement of the employee to the same position he held at the time of the disciplinary or retaliatory action and at the same site of employment or to a comparable position at that site, the payment of back wages, full reinstatement of fringe benefits and seniority rights, or any combination of these remedies. The court also may award the prevailing party all or a portion of the costs of litigation, and if the employee who brought the action prevails in the action, may award the prevailing employee reasonable attorney's fees, witness fees, and fees for experts who testify at trial, in an amount the court determines appropriate. If the court determines that an employer deliberately has violated division (B) of this section, the court, in making an award of back pay, may include interest at the rate specified in section 1343.03 of the Revised Code. "(F) Any report filed with the inspector general under this section shall be filed as a complaint in accordance with section 121.46 of the

Revised Code."

I

Appellant's Statutory Cause of Action

The record reveals that appellant orally notified appellees of claimed health and safety ****314** violations at the Structural Fibers plant long before he reported the matter O OSHA. However, appellant never provided appellees with a written report concerning these alleged violations. The trial court and the court of appeals held that R.C. 4113.52(A)(1)(a) required appellant to notify appellees both orally and in writing concerning the alleged safety and health violations in order to gain statutory protection as a whistleblower. Therefore, the trial court and the court of appeals held that appellant was not entitled to statutory protection under R.C. 4113.52 because he had failed to strictly comply with the requirements of R.C. 4113.52(A)(1)(a).

Appellant presents four propositions of law for our consideration. Propositions of Law nos. 1 and 3 read as follows:

"Proposition of Law No. 1

[1] "If an employer receives oral or written notification from an employee of a claimed health or safety violation as described in R.C. § 4113.52(A)(1)(a), and does not correct the violation or make a reasonable and good faith effort to correct the violation within 24 hours, the employee may file a written report with a regulatory official or agency as authorized by R.C. § 4113.52(A)(1)(a). That filing invokes the protection of the whistleblower statute. R.C. § 4113.52(A)-(B), explained."

"Proposition of Law No. 3

"A court addressing a summary judgment motion must consider not only the materials properly attached to the briefings in support and in opposition, but also all pleadings on file in the case. A court may not properly grant summary judgment on the ground that a party has not asserted a claim or theory in the lower court, where such claim or theory is plainly set forth in the complaint or

other pleading properly on file. ***"

In his first proposition of law, appellant contends that the trial court and the court of appeals erred in finding that he was required under R.C. 4113.52(A)(1)(a) to notify appellees both orally and in writing concerning the alleged safety and health violations. Specifically, appellant interprets R.C. 4113.52(a)(1)(a) as providing ***141** that if an employer receives oral notification from an employee of a claimed health or safety violation of the type described in R.C. 4113.52(A)(1)(a), and the employer fails to correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours, the employee may file a written report with an appropriate individual or agency specified in R.C. 4113.52(A)(1)(a) and is entitled to the protections of the Whistleblower Statute. We reject appellant's interpretation of R.C. 4113.52(A)(1)(a).

Recently, in Contreras v. Ferro Corp. (1995), 73 Ohio St.3d 244, 652 N.E.2d 940, this court outlined the specific procedures that must be followed under R.C. 4113.52(A)(1)(a) for an employee to gain statutory protection for reporting certain information to outside authorities. In Contreres, supra, at 246-249, 652 N.E.2d at 942-944, we stated:

"Ohio's Whistleblower Statute, R.C. 4113.52, provides specific procedures an employee must follow to gain statutory protection as a whistleblower. R.C. 4113.52(a)(1)(a) addresses the situation where an employee in the course of his or her employment becomes aware of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that the employer has the authority to correct, and the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm or a hazard to public health or safety or is a felony. Under such circumstances, R.C. 4113.52(A)(1)(a) requires that the employee orally notify his or her supervisor or other responsible officer of the employer of the violation and subsequently file with that person a written report that provides sufficient detail to identify and describe the violation. If

these requirements have been satisfied and the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification or the receipt of the written report, whichever is earlier, the employee may then file a written report with the prosecuting authority of the county or municipal corporation ****315** where the violation occurred or with some other appropriate person specified in R.C. 4113.52(A)(1)(a).

"Clearly, the provisions of R.C. 4113.52(a)(1) contemplate that the employer shall be given the opportunity to correct the violation. The statute mandates that the employer be informed of the violation both orally and in writing. An employee who fails to provide the employer with the required oral notification and written report is not entitled to statutory protection for reporting the information to outside authorities. If the employee provides the employer with oral notification and a written report, the employee may be entitled to the protections of the whistleblower statute for reporting the information to outside authorities. If the employee provides the employer with oral notification and a written report, the employee may be entitled to the protections of the whistleblower statute for reporting the information to outside authorities only if the employer has failed to correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours ***142** after the oral notification or the receipt of the written report, whichever is earlier. R.C. 4113.52(A)(1)(b) contemplates that the employer will apprise the employee of its efforts to correct the violation. That provision mandates that if an employee makes a report to his or her employer under R.C. 4113.52(A)(1)(a), the employer, within twenty-four hours after the oral notification was made or the report received or by the close of business on the next regular business day, whichever is later, must provide written notice to the employee of any efforts the employer made to correct the alleged violation or hazard or of the absence of the alleged violation or hazard. Only after all these various procedures and requirements have been

satisfied, and only if the employer has not corrected the violation or made a reasonable and good faith effort to correct the violation may the employee report the violation to outside authorities--but only those authorities specified in R.C. 4113.52(A)(1)(a).

"Therefore, to restate, R.C. 4113.52(A)(1) protects an employee for reporting certain information to outside authorities only if the following requirements have first been satisfied: (1) the employee provided the required oral notification to the employee's supervisor or other responsible officer of the employer, (2) the employee filed a written report with the supervisor or other responsible officer, and (3) the employer failed to correct the violation or to make a reasonable and good faith effort to correct the violation. Further, R.C. 4113.52(A)(1)(a) sets forth the sole acceptable manner in which the employee may 'blow the whistle' to outside authorities. Specifically, the employee may file a written report that provides sufficient detail to identify and describe the violation with the proper prosecuting authority or other appropriate official or agency with regulatory authority over the employer and the industry, trade or business in which the employer is engaged. An employee who fails to follow the specific requirements of the statute is not a protected whistleblower and, accordingly, may not bring a wrongful discharge action pursuant to R.C. 4113.52." (Emphasis added in part and deleted in part; footnote omitted.)

We continue to believe that our discussion in Contraires concerning the specific procedural reporting requirements of R.C. 4113.52(A)(1)(a) comports with the express terms of the Whistleblower Statute. Here, appellant orally notified appellees of the claimed health and safety violations concerning airborne chemicals at the Structural Fibers plant. Appellees failed to address appellant's concerns. Thereafter, appellant proceeded to report the matter to OSHA without ever having provided appellees with a written report describing the alleged violations. The fact that appellant reported to OSHA without having notified his employer both orally and in writing concerning the alleged health and safety violations is fatal to his claim for protection under R.C.

4113.52(A)(1)(a).

***143** [2][3] Nevertheless, in his third proposition of law, appellant contends that he was a protected whistleblower under the terms of R.C. 4113.52(a)(2). R.C. 4113.52(A)(2) addresses the situation where an employee becomes aware in the course of his or her employment of a violation of R.C. Chapter 3704 (Air Pollution Control Act), 3734 (Solid and Hazardous Wastes Act), 6109 (Safe Drinking Water Act), or 6111 (Water Pollution Control Act) that is a criminal offense. ****316** Under such circumstances, the employee may directly notify any appropriate public official or agency with regulatory authority over the employer and the industry, trade, or business in which the employer is engaged. There is no requirement in R.C. 4113.52(A)(2)that the employee notify his or her employer of the perceived violations. Therefore, appellant suggests that the trial court erred in dismissing his statutory cause of action solely because he had failed to file a written report with his employer.

The court of appeals refused to address appellant's arguments in this regard, stating:

"In the second assignment of error, appellant maintains that the trial court erred in dismissing his whistle-blower claim because R.C. 4113.52(A)(2) dispenses with any notice to the employer when the complaint involves R.C. Chapters 3704 and 3434. * * *

"A review of the record, however, reveals that appellant never argued this theory in the trial court. It is well established that an appellant may not assert a new theory for the first time before the appellate court. * * * Accordingly, this court will not address appellant's argument that no notice to the employer is required for complaints regarding R.C. Chapters 3704 and 3734."

However, we find that appellant clearly raised a claim for protection under R.C. 4113.52(A)(2) in Count One of his amended complaint, wherein he set forth the following relevant allegations in support of his statutory cause of action for violations of the Whistleblower Statute:

"4. Beginning in late January, 1991, in the course of his

employment with defendant, plaintiff became aware of activities, conditions and company policies at the work place which constituted an imminent risk of physical harm to himself and other employees and a hazard to public health.

"5. Among other things, these included the use and discharge into the air in the work area of highly toxic or corrosive chemicals such as acetone, styrene, epoxy resins, and cobalt mixes.

"6. These activities, conditions and company policies at the work place constitute a violation of various state and federal laws including but not limited to the Occupational Safety and Health Act of 1970 and Ohio Revised Code Chapters 3704 and 3434.

#144"7. These activities, conditions and company policies also constitute a criminal offense under those laws.

"* * * "10. When the problems were not corrected, plaintiff reported them to the Occupational Safety and Health Administration. * * *

"11. Shortly after plaintiff reported these matters to OSHA, defendant began to discriminate and retaliate against plaintiff because of making this report and these charges.

"* * *" 17. Defendant's conduct in retaliating against appellant for filing a report with OSHA], is unlawful retaliation, specifically prohibited by R.C. 4113.52-.52 * * *."(Emphasis added.)

A fair reading of the amended complaint reveals that appellant raised a claim for protection under R.C. 4113.52(A)(2) by alleging that he had reported to OSHA concerning perceived criminal violations of R.C. Chapters 3704 and 3434. R.C. 4113.52(A)(2) specifically authorizes an employee to report such matters directly to any appropriate public official or agency having regulatory authority over the employer. Therefore, as a matter of law, there is no requirement for a reporter of information under R.C. 4113.52(A)(2) to inform his or her employer, either orally or in writing, concerning violations of the type described in R.C. 4113.52(a)(2). Accordingly, we disagree with the court of appeal's conclusion that appellant has somehow waived his claim that he was

a protected reporter of information under R.C. 4113.52(A)(2). The claim was specifically asserted in the factual allegations of the appellant's amended complaint. Apparently, the court of appeals believed that appellant was obligated to raise the issue of R.C. 4113.52(A)(2) in response to appellees' motion for summary judgment. However, appellees' motion for summary judgment did not attack appellant's claim for protection under R.C. ****317** 4113.52(A)(2). See discussion infra. Therefore, any omission by appellant to defend his (!)(2) claim for whistleblower protection in response to appellees' motion for summary judgment cannot constitute an abandonment of that claim.

Appellees contend that they were entitled to summary judgment on the statutory whistleblower cause of action despite appellant's claim for protection under R.C. 4113.52(A)(2). Specifically, appellees claim that their motion for summary judgment obligated appellant to produce evidence "beyond allegations and defenses of his pleading to show facts of his awareness about environmental crimes under R.C. Chapters 3704, 3734, 6109 or 6111* * *." To support this argument, appellees cite Wing v. Anchor Media, Ltd. Of Texas (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus, wherein a ***145** majority of this court held that "[a] motion for summary judgment forces the nonmoving party to produce evidence on any issue for which tat party bears the burden of production at trial." However, in Dresher v. Burt (1996), 75 Ohio St.3d 280, 295, 662 N.E.2d 264, 275, we limited paragraph three of the syllabus of Wing. In Dresher, at 293, 662 N.E.2d at 274, we held:

"[A] party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no

evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(c) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. However, if the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." [FN3] (Emphasis added in part and deleted in part.)

FN3. Civ.R. 56 sets forth, among other things, the standards to be applied in a summary judgment proceeding. Civ.R. 56 provides: "(A) For party seeking affirmative relief. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of the time permitted under these rules for a responsive motion or pleading by the adverse party, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court. "(B) For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court. "(C) Motion and proceedings thereon. The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case,

and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. " * * *(E) Form of affidavits; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

****318 *146** Here, appellant's amended complaint clearly raised a claim for whistleblower protection under R.C. 4113.52(A)(2). In the amended complaint, appellant also sought to advance a claim for protection under R.C. 4113.52(A)(1)(a). In their motion for summary judgment, appellees asserted that they were entitled to judgment on appellant's entire statutory cause of action for violations of the Whistleblower Statute, stating that "(1) Kulch cannot establish a prima facie case [of violations of the

Whistleblower Statute] because he failed to satisfy the detailed statutory prerequisites to filing a lawsuit under R.C. § 4113.52; and, (2) Kulch was terminated for legitimate business reasons ** *." In a memorandum in support of the motion, appellees argued that appellant could not establish a prima facie case of violations of the Whistleblower Statute for several reasons. First, appellees argued that Kulch's report to OSHA did not concern criminal violations of the Occupational Safety and Health Act of 1970, Section 651 et seq., Title 29, U.S.Code. In this regard, appellees claimed that Kulch's report to OSHA was not a report concerning a "criminal offense" within the meaning of R.C. 4113.52(A)(1)(a). Second, appellees argued that, contrary to R.C. 4113.52(A)(1)(a), Kulch had failed to orally notify them of health and safety violations before reporting the matter to OSHA. Third, appellees asserted that Kulch had never provided them with a written report concerning the alleged health and safety violations. Alternatively, appellees argued that Kulch could not establish a prima facie case of violations of the Whistleblower Statute, since Kulch had been terminated for, inter alia, unsatisfactory work performance. To support these various arguments, appellees relied upon deposition testimony, affidavits, and other materials of the type listed in Civ.R. 56(C).

In response to the motion for summary judgment, appellant relied upon evidentiary materials of the type listed in Civ.R. 56© indicated that there were genuine issues of material fact remaining to be litigated concerning the reasons for his termination. Appellant also pointed to evidence indicating that he had verbally notified appellees regarding the conditions at the Structural Fibers plant before he reported the matter to OSHA, but he did not raise any specific issue or ***147** argument concerning R.C. 4113.52(A)(2). However, in their motion for summary judgment, appellees pointed to no evidentiary materials indicating the lack of a genuine issue of material fact whether Kulch was a protected whistleblower under the terms of R.C. 4113.52(A)(2) for having directly reported to OSHA concerning alleged criminal violations

of R.C. Chapters 3704 and 3734.

Appellees' motion for summary judgment clearly dealt with appellant's failure to comply with the specific reporting requirements of R.C. 4113.52(A)(1)(a). In this regard, appellees were successful in defeating any claim that appellant was a protected whistleblower under the provisions of R.C. 4113.52(A)(1)(a), since it was undisputed that appellant had reported to OSHA without having notified his employer, both orally and in writing, concerning the alleged criminal violations. However, appellees never satisfied (or even attempted to satisfy) their initial burden under Civ.R. 56 of demonstrating that there were no genuine issues of material fact concerning appellant's claim for whistleblower protection under the provisions of R.C. 4113.52(A)(2). Thus, appellant had no obligation to respond to the motion by raising or otherwise supporting the factual allegations already contained in his amended complaint pertaining to his claim for possible whistleblower protection under R.C. 4113.52(A)(2).

The trial court granted summary judgment in favor of appellees on appellant's entire statutory cause of action solely because appellant had not complied with the specific reporting requirements of R.C. ****319** 4113.52(A)(1)(a). Appellant's amended complaint sought whistleblower protection under R.C. 4113.52(A)(2) as well as 4113.52(A)(1)(a). By entering summary judgment against appellant on his entire statutory claim, the trial court erred to the extent that it dismissed appellant's claim for protection under R.C. 4113.52(A)(2). Appellees never challenged appellant's claim that his report to OSHA was an authorized report under R.C. 4113.52(A)(2). Moreover, contrary to appellees' suggestions, appellant had no obligation to respond to the motion for summary judgment by producing evidence on every element of his claim for protection under R.C. 4113.52(A)(2), since appellees never discharged their initial burden of demonstrating the absence of a genuine issue of material fact concerning that claim and their entitlement to judgment as a matter of law.

Appellees now protest that appellant never reported the

alleged criminal violations of R.C. Chapters 3704 and 3734 to the public authority responsible for enforcement of those laws. Appellees also contend that the matters reported to OSHA did not constitute criminal violations of R.C. Chapters 3704 and 3734. Appellant counters appellees' first argument by noting that (1) R.C. 4113.52(A)(2) authorizes an employee to report alleged criminal violations involving R.C. Chapters 3704 and 3734 to any appropriate public official or agency that has regulatory authority over the employer, and (2) OSHA was a regulatory agency with regulatory authority over appellees. Appellant counters appellees' second ***148** argument by asserting that his report to OSHA clearly involved criminal violations of R.C. Chapters 3704 and 3734. Additionally, appellant claims that his report to OSHA was authorized under R.C. 4113.52(A)(2)even if no actual violation of R.C. Chapters 3704 and 3734 occurred, since he reasonably believed that appellees' conduct involved criminal violations of those Chapters of the Revised Code. Appellant's contentions in this regard are bolstered by our recent decision in Fox v. Bowling Green (1996), 76 Ohio St.3d 534, 668 N.E.2d 898, wherein we stated that, "[f]rom a public policy perspective, the 'reasonable belief' standard is the only acceptable interpretation of the [whistleblower]statute. R.C. 4113.52 was designed to give whistleblowers some protection in the Ohio's employment-at-will environment. * * * The public, in turn, relies on whistleblowers for protection. The 'actual violation' standard could delay a whistleblower's reporting of a violation which endangers the public safety, or at worst, prevent him from reporting the violation at all. The statute expects a whistleblower to be vigilant, attuned to the public's safety, loyal to his employer, and sometimes even brave--it does not require him to be infallible." (Emphasis added.) Id. at 538-539, 668 N.E.2d at 902.

Obviously, the proper place for appellees to have raised their arguments concerning the viability of appellant's claim for whistleblower protection under R.C. 4113.52(A)(2) was in their motion for summary judgment at the trial court level. This

appellees failed to do. Accordingly, we will not address the merits of appellees' contentions that appellant is not a protected whistleblower under the provisions of R.C. 4113.52(A)(2). These arguments may be raised before the trial court on remand.

In conclusion, we find that the grant of summary judgment in favor of appellees on appellant's statutory cause of action for violations of the Whistleblower Statute was appropriate to the extent that appellant claimed protection as a whistleblower under R.C. 4113.52(A)(1)(a). However, we find that the trial court erred in granting summary judgment in favor of appellees on appellant's claim for protection under R.C. 4113.52(A)(2). Accordingly, we reject appellant's first proposition of law, but find his third proposition of law to be well taken. We vacate that portion of the trial court's judgment which dismissed appellant's claims for protection under R.C. 4113.52(A)(2), reinstate appellant's statutory claim that he was unlawfully retaliated against by appellees for having filed an authorized report under R.C. 4113.52(A)(2), and remand this cause to the trial court for further proceedings on the statutory cause of action.

II
Greeley Claim

[4] In his second proposition of law, appellant contends that he also has an independent ****320** common-law cause of action based upon Greeley, supra, 49 Ohio***149** St.3d 228, 551 N.E.2d 981, for wrongful discharge in violation of public policy. Appellant suggests that he is entitled to maintain his Greeley claim either in addition to or in lieu of his statutory cause of action. We agree with appellant's contentions in this regard. Accordingly, for the reasons that follow, we reverse that portion of the court of appeals' judgment which affirmed the grant of summary judgment against appellant on the claim of wrongful discharge in violation of public policy.
[FN4.]

FN4. The court of appeals apparently assumed (and the parties to this appeal apparently agree) that the trial court granted summary judgment in favor of appellees on appellant's claim of wrongful discharge in violation of public policy. We accept this assumption for purposes of this appeal. However, we note, in passing, that appellees moved for judgment on the pleadings (Civ.R.12[C]) with respect to appellant's claim of wrongful discharge in violation of public policy--not for summary judgment under Civ.R. 56.

In Greeley, 49 Ohio St.3d 228, 551 N.E.2d 981, Robert Greeley, an at-will employee, was allegedly discharged from his employment solely because his employer had received a court order requiring the withholding of a specific amount of Greeley's wages for child support. Greeley sued his former employer for wrongful discharge, since R.C. 3113.213(D) prohibits from using a child support wage withholding order as a basis for discharging an employee. R.C. 3113.213(D) sets forth a monetary fine for employers who violate the statute but does not provide for a private cause of action on behalf of the aggrieved employee. In Greeley, we recognized a public-policy exception to the employment-at-will doctrine and held that Greeley was entitled to maintain a cause of action in tort against his former employer for wrongful discharge. Id. At 233-235, 551 N.E.2d at 986-987. Specifically, in Greeley, at paragraphs one, two and three of the syllabus, we held that:

"1. Public policy warrants an exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute. (R.C. 3113.213[D], construed and applied.)

"2. Henceforth, the right of employers to terminate employment at will for 'any cause' no longer includes the discharge of an employee where the discharge is in violation of a statute and thereby contravenes public policy. (Fawcett v. G.C. Murphy & Co. [1976], 46 Ohio St.2d 245, 75 O.O.2d 291, 348 N.E.2d 144, modified.)

"3. In Ohio, a cause of action for wrongful discharge in

violation of public policy may be brought in tort."

Additionally, in Greeley, we recognized that the public-policy exception to the employment-at-will doctrine need not be premised solely upon a violation of a specific statute. We said that: "Today, we only decide the question of a public policy exception to the employment-at-will doctrine based on violation of a specific ***150** statute. This is not to say that there may not be other public policy exceptions to the doctrine but, of course, such exceptions would be required to be of equally serious import as the violation of a statute." (Emphasis added.) Id., 49 Ohio St.3d at 234-235, 551 N.E.2d at 987.

In Tulloh v. Goodyear Atomic Corp. (1992), 62 Ohio St.3d 541, 584 N.E.2d 729, syllabus, this court held that "[a]bsent statutory authority, there is no common-law basis in tort for a wrongful discharge claim." The syllabus in Tulloh was supported by a majority composed of two justices and two visiting judges.

However, in Painter v. Graley (1994), 70 Ohio St.3d 377, 639 N.E.2d 51, paragraphs two and three of the syllabus, we held that:

"2. To state a claim of wrongful discharge in violation of public policy, a plaintiff must allege facts demonstrating that the employer's act of discharging him contravened a 'clear public policy.' (Greeley v. Miami Valley Maintenance Contractors, Inc. [1990], 49 Ohio St.3d 228, 551 N.E.2d 981, affirmed and followed.)

"3. 'Clear public policy' sufficient to justify an exception to the employment-at-will doctrine is not limited to public policy expressed by the General Assembly in the form of statutory enactments, but may also be discerned as a matter of law based on other sources, such as the Constitutions of Ohio ****321** and the United States, administrative rules and regulations, and the common law. (Tulloh v. Goodyear Atomic Corp. [1992], 62 Ohio St.3d 541, 584 N.E.2d 729, overruled.)" (Emphasis added.)

Therefore, Greeley and Painter recognize an exception to the employment-at-will doctrine when an at-will employee is

discharged or disciplined for a reason that contravenes clear public policy. There is no question that Greeley and Painter recognize that clear public policy may be ascertained from a statutory provision or from any number of other sources. If there was ever any serious question whether a specific statute had to be violated for Greeley to apply, Painter answered that question in the negative by expressly overruling Tulloh, supra. See Painter, paragraph three of the syllabus. The question whether the Greeley public-policy exception to the employment-at-will doctrine applies only in cases involving a statutory violation was soundly rejected not only in Painter, but in the recent cases of Collins v. Rizkana (1995), 73 Ohio St.3d 65, 652 N.E.2d 653.

[5] In determining whether appellant has a viable common-law cause of action under Greeley and its progeny for tortious wrongful discharge in violation of public policy, we reaffirm the following suggested analysis set forth in Painter, supra, 70 Ohio St.3d at 384, 639 N.E.2d at 57, fn. 8:

***151** "In reviewing future cases, Ohio courts may find useful the analysis of Villanova Law Professor H. Perritt, who, based on review of cases throughout the country, has described the elements of the tort as follows:

" '1. That [a] clear public policy existed and was manifested in a state or federal constitution, statute or administrative regulation, or in the common law (the clarity element).

" '2. That dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element).

" '3. The plaintiff's dismissal was motivated by conduct related to the public policy (the causation element).

" '4. The employer lacked overriding legitimate business justification for the dismissal. (The overriding justification element.)' (Emphasis sic.)

"H. Perritt, The Future of Wrongful Dismissal Claims: Where Does Employer Self Interest Lie? (1989), 58 U.Cin.L.Rev.

397, 398-399."

[6][7] We recently applied this same analysis in Collins, supra, 73 Ohio St.3d at 69-74, 652 N.E.2d at 657-660, in determining that, in Ohio, a cause of action may be brought for the tort of wrongful discharge in violation of public policy based on sexual harassment/discrimination in the workplace. In Collins, we noted that the clarity and jeopardy elements of the tort of wrongful discharge are questions of law to be determined by the court. Id. at 70, 652 N.E.2d at 658. Conversely, the causation and overriding justification elements are questions of fact for the trier-of-fact. Id. Thus, given the procedural disposition of the case at bar, we consider only he clarity and jeopardy elements of the tort of wrongful discharge.

[8] Turning to the clarity element, we are easily able to identify at least two main sources of public policy prohibiting the alleged retaliatory discharge of appellant based on his report to OSHA. For the reasons that follow, we find that each of these two sources of public policy is independently sufficient to justify an exception to the employment-at-will doctrine and to warrant recognition of a cause of action for wrongful discharge in violation of public policy.

The first main source of expressed public policy can be found in Section 660(c), Title 29, U.S.Code, which specifically prohibits employers from retaliating against employees (like appellant) who file OSHA complaints. Section 660(c) does not provide an employee with a private right of action against the employer. Section 660(c)91), Title 29, U.S.Code provides: "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter [the federal Occupational Safety and Health Act, Section 651 et seq., ****322** Title 29, U.S.Code] * * * or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter." As explained ***152** in our discussion infra, this federal statute constitutes a sufficiently clear

expression of public policy to warrant an exception to the doctrine of employment at will, since the federal statute is consistent with Ohio's public policy favoring workplace safety.

Appellees suggest, however, that federal statutes cannot be used to determine whether there is a sufficiently clear public policy to justify an exception to the employment-at-will doctrine. In this regard, appellees point to paragraph three of the syllabus in Painter, 70 Ohio St.3d 377, 639 N.E.2d 51, which does not include any reference to federal statutes as providing a basis for a Greeley claim. However, the analysis of the "clarity element" we employ in he case at bar is the one specifically suggested in Painter, supra, at 384, 639 N.E.2d at 57, fn.8. That analysis mandates consideration of the question whether clear public policy is manifested in a state or federal constitution, statute or administrative regulation, or in the common law. Id. See, also, Collins, 73 Ohio St.3d at 69-70, 652 N.E.2d at 657-658, wherein we adopted the suggested analysis set forth in footnote eight of the Painter decision, including the suggested analysis of the clarity element of the tort of wrongful discharge. Furthermore, in Mers V. Dispatch Printing Co. (1985), 19 Ohio St.3d 100, 103, 19 OBR 261, 263, 483 N.E.2d 150, 15, we recognized that the employment-at-will doctrine in Ohio is not "without any defined limits." In Mers, we specifically cited Section 660(c), Title 29, U.S.Code as one example of the type of laws forbidding retaliatory discharge. Id. At 103, 19 OBR at 263-264, 483 N.E.2d at 153, fn. 2.

Courts in other jurisdictions have also determined that the public policy embodied in the federal Occupational Safety and Health Act, Section 651 et seq., Title 29, U.S.Code, may serve as a basis for recognition of a common-law cause of action for wrongful discharge in violation of public policy. See, e.g., Cloutier v. Great Atlantic & Pacific Tea Co., Inc. (1981), 121 N.H. 915, 436 A.2d 1140, and Sorge v. Wright's Knitwear Corp. (E.D.Pa.1993), 832 F.Supp. 118. In this regard, we are particularly persuaded by the case of Cerracchio v. Alden Leeds,

Inc. (1988), 223 N.J.Super. 435, 538 A.2d 1292 (holding that at-will employee discharged for filing OSHA complaint could maintain tort action for wrongful discharge in violation of New Jersey's public policy favoring workplace safety).

Ohio's public policy is clearly in keeping with the laudable objectives of the federal Occupational Safety and Health Act. The public policy of this state demands that employees be provided with a safe work environment and that unsafe working conditions be corrected. This conclusion is supported by a host of statutes and constitutional provisions favoring safety in the workplace. See, e.g., Sections 34 and 35, Article II of the Ohio Constitution; R.C. 4101.11 (duty of employer to protect employees and frequenters); R.C. 4101.12 (duty of employer to furnish safe place of employment); R.C. 4121.13 (safety and investigative ***153** duties of the Administrator of Workers' Compensation); R.C. 4121.17 (duty of the Bureau of Workers' Compensation to investigate petitions concerning unsafe employment or places of employment); R.C. 4121.47 (no employer shall violate a specific safety rule adopted by the Administrator of Workers' Compensation or an Act of the General Assembly to protect the lives, health, and safety of employees); and R.C. 4121.48 (occupational safety loan program to reduce employment hazards and promote health and safety of employees). Retaliation against employees who file OSHA complaints concerning unsafe or unhealthy conditions in the workplace is an absolute affront to Ohio's public policy favoring workplace safety. Such retaliation clearly contravenes the public policy of this state.

[9][10] The second main source of expressed public policy prohibiting appellant's alleged retaliatory discharge is R.C. 4113.52, which embodies a clear public policy favoring whistleblowing. However, the public policy embodied in the Whistleblower Statute is limited. By imposing strict and detailed requirements on certain whistleblowers and restricting the statute's applicability to a narrow set of circumstances, the legislature clearly intended to encourage whistleblowing ****323** only to the

extent that the employee complies with the dictates of R.C. 4113.52. As we held in Contreras, supra, 73 Ohio St.3d 244, 652 N.E.2d 940, syllabus: "In order for an employee to be afforded protection as a 'whistleblower,' such employee must strictly comply with the dictates of R.C. 4113.52. Failure to do so prevents the employee from claiming the protections embodied in the statute."

[11] In Contreras, the plaintiff-appellant, Phillip Contreras, was allegedly discharged from his employment for whistleblowing. Contreras sued his former employer for alleged violations of the Whistleblower Statute and for wrongful discharge in violation of public policy. In Contreras, we found that because Contreras had not complied with the specific reporting requirements of R.C. 4113.52, he could not avail himself of the protections of the Whistleblower Statute. Id., 73 Ohio St.3d at 249, 652 N.E.2d at 944. Further, we found that the question whether Contreras was entitled to maintain a cause of action for the tort of wrongful discharge was moot, stating: "If appellant was entitled to maintain a Greeley claim, an issue that today we do not decide, then that claim would have to be based upon the public policy embodied in R.C. 4113.52. Since appellant did not comply with the statute in the first instance, he would have no foundation for a Greeley claim if, in fact, he was entitled to assert such a claim. Therefore, in this case the issue is moot." Id. At 251, 652 N.E.2d at 946. The obvious implication of Contreras is that an employee who fails to strictly comply with the requirements of R.C. 4113.52 cannot base a Greeley claim solely upon the public policy embodied in that statute.

***154** Here, appellant claims to have been wrongfully discharged for having reported his employer to OSHA for what he apparently believed were criminal violations of the Occupational Safety and Health Act and R.C. Chapters 3704 and 3734. In our discussion in Part I, supra, we determined that appellant did not strictly comply with the requirements of R.C. 4113.52(A)(1)(a) in reporting his employer to OSHA. Therefore, it is clear that appellant has no foundation for a Greeley claim based on the public

policy embodied in R.C. 4113.52 protecting employees who report matters in accordance with R.C. 4113.52(A)(1)(a). However, in our discussion in Part I, supra, we determined that the trial court erred in dismissing appellant's claim for whistleblower protection under R.C. 4113.52(A)(2). Therefore, assuming that appellant complied with the reporting requirements of R.C. 4113.52(A)(2) and that appellees retaliated against him in a manner contrary to the terms of the Whistleblower Statute, appellant has stated a second and independent foundation for a Greeley claim premised upon the clear public policy embodied in R.C. 4113.52.

Contreras, supra, 73 Ohio St.3d 244, 652 N.E.2d 940, is readily distinguishable from the case at bar. The plaintiff-employee in Contreras had no viable statutory cause of action for protection under the Whistleblower Statute but asserted a Greeley claim based solely on the public policy embodied in R.C. 4113.52. However, the public policy embodied in R.C. 4113.52 could not have supported that claim, since the employee had failed in the first instance to comply with the dictates of the statute. In the case at bar, appellant continues to have a viable claim for whistleblower protection, since he arguably complied with R.C. 4113.52 (A)(2) in reporting matters to OSHA. Thus, to the extent that he complied with R.C. 4113.52, appellant has established a firm foundation for a Greeley claim for wrongful discharge in violation of the public policy embodied in the Whistleblower Statute. Additionally, and in any event, appellant's Greeley claim is fully and independently supported by the first source of public policy identified in our discussion, supra --the clear public policy of this state encouraging safety in the workplace and forbidding retaliation against those who file OSHA complaints aimed at correcting unsafe and unhealthy working conditions.

Having identified two separate and independent sources of clear public policy justifying an exception to the employment-at-will doctrine, we must now consider whether dismissing employees under circumstances like those involved in this case would jeopardize the public policy (the jeopardy element).

With respect to the first identified source of public policy, there is no question that ****324** Ohio's policy favoring workplace safety would be seriously compromised (jeopardized) if employers were allowed to fire employees for reporting matters to OSHA. Obviously, such retaliatory practices could deter employees from reporting what they believe to be legitimate health and safety concerns. Here, ***155** appellant complained to OSHA concerning the health and safety of his work environment. He claims to have done so based upon a good faith belief that the complaint was valid. According to appellant, he was retaliated against and ultimately discharged for having filed his complaint with OSHA. Under these circumstances, we find that the jeopardy element of the tort of wrongful discharge has clearly been satisfied.

The jeopardy analysis relating to the second identified source of clear public policy, R.C. 4113.52, is a bit more difficult. This is so because R.C. 4113.52 contains certain civil remedies for qualifying whistleblowers. However, the civil remedies set forth in R.C. 4113.52 are not adequate to fully compensate an aggrieved employee who is discharged, disciplined, or otherwise retaliated against in violation of the statute. In this regard, recognizing the right of an aggrieved employee who is retaliated against in violation of R.C. 4113.52 to maintain a Greeley-based common-law cause of action for the violation of the public policy embodied in that statute would serve to encourage the legislative objectives of R.C. 4113.52 and complement the limited remedies available under the Whistleblower Statute.

Appellees suggest, however, that Greeley, supra, 49 Ohio St.3d 228, 551 N.E.2d 981, applies only in cases where an employee is discharged or disciplined for a reason prohibited by a statute that provides the employee no specific remedy. We reject such a narrow interpretation of Greeley. The syllabus in Greeley does not say that. Greeley and its progeny stand for the proposition that, in Ohio, the judicially recognized doctrine of employment at will has certain limitations. One of those limitations is that the doctrine will not be followed in cases where an at-will employee is

discharged or disciplined for a reason that violates a statute and thereby contravenes public policy. Greeley, supra, paragraphs one and two of the syllabus. The syllabus in Greeley makes no exception for statutes like R.C. 4113.52 that contain remedial provisions. That, of course, was no mistake. The Greeley public-policy exception to the doctrine of employment at will was not intended to apply only where a statute provides no civil remedies. Rather, Greeley and its progeny are intended to bolster the public policy of this state and to advance the rights of employees who are discharged or disciplined in contravention of clear public policy. Accord Amos v. Oakdale Knitting Co. (1992), 331 N.C. 348, 356, 416 S.E.2d 166, 171 (holding that a public-policy exception to the employment-at-will doctrine adopted by the North Carolina Supreme Court in Coman v. Thomas Mfg. Co. [1989], 325 N.C. 172, 381 S.E.2d 445, was "not just a remedial gap-filler. It is a judicially recognized outer limit to a judicially created doctrine, designed to vindicate the rights of employees fired for reasons offensive to the public policy of [North Carolina]. The existence of other remedies, therefore, does not render the public policy exception moot."). We are not now ***156** prepared nor have we ever been inclined to limit Greeley to the extent urged by appellees.

[12] Additionally, recognizing the right of an at-will employee who is discharged or disciplined in violation of R.C. 4113.52 to maintain a Greeley claim, a statutory whistleblower claim, or both, would foster (not hinder) the public policy of this state to protect whistleblowers from unlawful retaliatory measures. Therefore, the mere existence of statutory remedies in R.C. 4113.52 does not, without more, operate to bar recognition of appellant's Greeley claim for tortious wrongful discharge in violation of R.C. 4113.52. This conclusion is supported by a number of our prior cases, including Helmick v. Cincinnati Word Processing, Inc. (1989), 45 Ohio St.3d 131, 543 N.E.2d 1212; Kerans v. Porter Paint Co. (1991), 61 Ohio St.3d 486, 575 N.E.2d 428; and Collins, supra, 73 Ohio St.3d 65, 652 N.E.2d 653.

In Helmick, at 133-135, 543 N.E.2d at 1215-1216, this court determined that the provisions of R.C. Chapter 4112 prohibiting employment discrimination based on sex did ****325** not preempt common-law intentional tort claims arising out of acts of sexual discrimination in the workplace. We reached this conclusion even though the statutory scheme provided specific remedies for the victims of the sex discrimination. We noted that the relief available under the statutory scheme did not parallel the damages available in a common-law tort action. Id. We held that "[a]llowing a plaintiff to pursue common-law remedies in lieu of the relief provided under R.C. Chapter 4112 creates no conflict and serves to supplement the limited protection and coverage of that chapter." Id. at paragraph two of the syllabus.

Similarly, in Kerans, supra, 61 Ohio St.3d 486, 575 N.E.2d 428, paragraph one of the syllabus, we held that "[t]he workers' compensation statute does not provide the exclusive remedy for claims based upon sexual harassment in the workplace." We reached this conclusion, since the relief available under the statute would be insufficient to remedy the damages actually suffered by the victim. Id. at 489, 575 N.E.2d at 431.

Recently, in Collins, supra, 73 Ohio St.3d 65, 652 N.E.2d 653, we recognized the right of an employee to maintain a Greeley claim based upon sexual harassment/discrimination in the workplace. We did so despite the fact that the employee in Collins was discriminated against in violation of the public policy embodied in R.C. Chapter 4112, which sets forth specific remedies for victims of sexual harassment/discrimination in the workplace. We note, however, that the employee in Collins was unable to avail herself of the remedies set forth in R.C. Chapter 4112 because her employer never employed four or more people and, thus, did not come within the scope of R.C. Chapter 4112. Id. at 74, 652 N.E.2d at 660.

***157** It is clear from the reasoning of Helmick, Kerans, and perhaps even Collins, supra, that R.C. 4113.52 does not provide the exclusive remedy for at-will employees who are discharged or

disciplined for a reason prohibited by the public policy embodied in that statute. The remedies available pursuant to R.C. 4113.52 are not sufficient to provide the complete relief that would otherwise be available in a Greeley-based cause of action for the tort of wrongful discharge. The statute does not provide for certain compensatory damages and does not specifically authorize recovery of punitive damages. Most important, the statute permits the court to fashion an award based upon whatever the court deems to be appropriate. See R.C. 4113.52(E). Clearly, the relief available to a whistleblower under a statutory cause of action comes nowhere near the complete relief available in an action based upon the Greeley public-policy exception to the doctrine of employment at will. In our judgment, the relief available in an action for the tort of wrongful discharge merely complements the limited statutory relief available pursuant to R.C. 4113.52. Thus, we find that the mere existence of statutory remedies for violations of R.C. 4113.52 does not operate as a bar to alternative common-law remedies for wrongful discharge in violation of the public policy embodied in the Whistleblower Statute.

Appellees note, however, that there was no cause of action in Ohio for an employee who was discharged or disciplined for whistleblowing prior to the enactment of R.C. 4113.52. Indeed, in 1986, in Phung v. Waste Mgt., Inc. (1986), 23 Ohio St.3d 100, 23 OBR 260, 491 N.E.2d 1114, paragraphs one and two of the syllabus, a majority (5-2) of this court held that public policy does not require an exception to the employment at-will doctrine when an employee is discharged for reporting to his employer that it is conducting its business in violation of law, and that an at-will employee who is discharged for reporting such matters has no common-law cause of action for wrongful discharge. In 1988, the General Assembly enacted the first version of Ohio's Whistleblower Statute (142 Ohio Laws, Part II, 3590-3593) in apparent response to Phung. In enacting the current and former versions of R.C. 4113.52 (which are virtually identical), the General Assembly set forth the procedure a whistleblower must follow to gain statutory

protection and also set forth limited statutory remedies for violations of the statute. The history of former R.C. 4113.52 reveals that the General Assembly had considered making a broader range of civil remedies available to qualified whistleblowers, but rejected that notion in favor ****326** of the more limited list of remedies set forth in both the current and former versions of R.C. 4113.52(E). See, generally, Trader v. People Working Cooperatively, Inc. (1996), 74 Ohio St.3d 1286, 1286-1289, 660 N.E.2d 737, 737-739 (Wright, J., dissenting)(discussing ***158** the legislative history of R.C. 4113.52). [FN5] Appellees urge that this history of R.C. 4113.52 and the fact that the statute sets forth a "new" right of action and a list of available remedies clearly demonstrate that it was the express will of the General Assembly in enacting R.C. 4113.52
to set forth the exclusive remedies for whistleblowers and to preempt any possible common-law remedies for retaliatory discharges based on whistleblowing. Again, we disagree.

FN5. It should be noted that the history of former R.C. 4113.52 discussed in the dissent in Trader v. People Working Cooperatively, Inc. (1996), 74 Ohio St.3d 1286, 1286-1289, 660 N.E.2d 737, 737-7390 (Wright, J., dissenting), appears to be inaccurate. The Trader dissent relied on Rheinecker v. Forest Laboratories (S.D. Ohio 1993), 826 F.Supp. 256, 258, fn. 2, as providing an accurate account of the legislative proceedings on Sub.H.B. No. 406. But the Trader dissent failed to recognize that statements made in footnote 2 of Rheinecker, supra, were apparently inaccurate and were subsequently modified by corrective order in Rheinecker v. Forest Laboratories, Inc. (S.D.Ohio 1994), 855 F.Supp. 913. However, a review of the materials submitted in the case at bar concerning the history of former R.C. 4113.52 clearly reveals that the General Assembly did, in fact, consider making a broader range of remedies available to qualifying whistleblowers, but later rejected that notion in favor of the more limited remedies set forth in the current and former versions of R.C. 4113.52(E).

As indicated immediately above, the legislative history of R.C. 4113.52 clearly reveals that the General Assembly considered and rejected the notion of providing a wider range of statutory civil remedies for qualifying whistleblowers who are discharged or disciplined in violation of the statute. However, this fact alone does not answer the question whether the remedies set forth in R.C. 4113.52 are intended to be exclusive. Nor is the fact that the legislature enacted R.C. 4113.52 in apparent response to Phung a persuasive reason to hold that the statute preempts the formation or recognition of an independent cause of action in tort under Greeley and its progeny for wrongful discharge in violation of public policy. Indeed, we find nothing in R.C. 4113.52 or its history that compels the conclusion that it was the express will of the General Assembly that any and all causes of action premised on whistleblowing must be commenced and remedied exclusively under R.C. 4113.52. Rather, on the basis of the information available, it is much more reasonable to conclude that the General Assembly enacted R.C. 4113.52 to remedy the defect in the law caused by this court's decision in Phung, but never intended to preclude the future development of the common law of this state in the area of "whistleblowing."

Furthermore, if the General Assembly had truly intended to make R.C. 4113.52 the sole and exclusive remedy for whistleblowers, it certainly knew how to do so. R.C. 4113.52 was presumably patterned after R.C. 124.341, Ohio's whistleblower protection statute pertaining to state employees. R.C. 124.341 was specifically considered by the General Assembly when it enacted R.C. 4113.52. This is convincingly demonstrated by the fact that R.C. 4113.52(D) specifically refers to R.C. 124.341. Additionally, the two statutes are similar in many respects. ***159** However, R.C. 124.341(D), unlike any provision of R.C. 4113.52, expressly states that the remedy set forth in the statute is the "sole and exclusive remedy" available for a qualifying whistleblower. R.C. 124.341(D) provides: "If an appointing authority takes any disciplinary or retaliatory action against a classified or unclassified

employee as a result of the employee's having filed a report under division (A) of this section, the employee's sole and exclusive remedy, notwithstanding any other provision of law, is to file an appeal with the state personnel board of review * * * *." (Emphasis added.) The absence of such language in R.C. 4113.52 can hardly be characterized as a mistake or oversight. Therefore, we presume that it was not the intent of the General Assembly in enacting R.C. 4113.52 to set forth the sole and exclusive remedies for whistleblowers or to preempt alternative common-law remedies for retaliatory discharges based on whistleblowing.

****327** There are a number of Ohio appellate and federal district court cases which have held that it was the express will of the General Assembly in enacting R.C. 4113.52 to set forth the exclusive remedies for whistleblowers and that R.C. 4113.52 preempts any possible common-law remedies for retaliatory discharges based on whistleblowing. See, e.g., Bear v. Geetronics, Inc. (1992), 83 Ohio App.3d 163, 168-169, 614 N.E.2d 803, 807; Murray v. Clinton Petroleum Co. (July 16, 1993), Portage App. No. 92-P-0086, unreported, 1993 Wl 268459; Rayel v. Wackenhut Corp. (June 8, 1995), Cuyahoga App. No. 67459, unreported, 1995 WL 350077; Ungrady v. Burns Internatl. Sec. Serv., Inc. (N.D.Ohio 1991), 767 F.Supp. 849, 852-853; and Rheinecker v. Forest Laboratories, Inc. (S.D.Ohio 1993), 813 F.Supp. 1307, 1312-1314, reconsideration denied (1993), 826 F.Supp. 256. A synopsis of the view that R.C. 4113.52 represents the sole and exclusive remedy for whistleblowers--a view adopted by the trial court and court of appeals in the case at bar--was set forth in a dissenting opinion to this court's order dismissing the case of Trader, supra, 74 Ohio St.3d 1286, 1286-1289, 660 N.E.2d 737, 737-739 (Wright, J., dissenting). However, the views expressed in the Trader dissent and the rationale supporting those views are wholly inconsistent with the conclusions we reach here today that R.C. 4113.52 has no preclusive effect on appellant's Greeley claim for tortious wrongful discharge in violation of public policy. In our discussion, supra, we have generally addressed and rejected many

of the major points made in the Trader dissent, but there remains one particular aspect of that dissent we feel compelled to address specifically.

In his dissent in Trader, Justice Wright (now retired from the bench) was joined by two current members of this court in stating that "[w]here a statute such as [R.C. 4113.52] creates a right that was not actionable at common law, the remedy prescribed is exclusive." Id. at 1287, 660 N.E.2d at 737. To support this proposition, the dissent in Trader cited Franklin Cty. Law Enforcement Assn. V. Fraternal Order of Police (1991), 59 Ohio St.3d 167, 169, 572 N.E.2d 87, 89, ***160** wherein this court quoted Zanesville v. Fannan (1895), 53 Ohio St. 605, 42 N.E. 703, paragraph two of the syllabus. Trader at 1287, 660 N.E.2d at 737. In Zanesville, paragraph two of the syllabus, this court held: "Where a statute which creates a new right, prescribes the remedy for its violation, the remedy is exclusive; but when a new remedy is given by statute fora right of action existing independent of it, without excluding other remedies already known to the law, the statutory remedy is cumulative merely, and the party may pursue either at his option." The principle of law set forth in Zanesville that where a statute creates a new right and prescribes the remedy for its violation, the remedy is exclusive, was derived from the case of Dunn v. Kanmacher (1875), 26 Ohio St. 497. See Zanesville, supra, 53 Ohio St. at 620, 42 N.E. at 706. In Dunn, supra, 26 Ohio St. at 504, the true principle of law is established that "where a statute gives a new right, and also prescribes the remedy for its violation, the remedy so prescribed must be taken as exclusive, unless it appears from the statute that the legislature intended otherwise." (Emphasis added.) Therefore, the intent of the legislature is the determining factor whether the remedies prescribed by R.C. 4113.52 are exclusive. As we stated in our discussion, supra, the history and language of R.C. 4113.52 move us to conclude that the General Assembly did not intend for the remedies prescribed by R.C. 4113.52 to be exclusive.

In his dissent in Trader, 74 Ohio St.3d at 1287, 660 N.E.2d

at 737-738, Justice Wright also attempted to support the above statement that "[w]here a statute such as [R.C. 4113.52] creates a right that was not actionable at common law, the remedy prescribed is exclusive," by citing yet another passage from Franklin Cty. Law Enforcement Assn., supra, 59 Ohio St.3d at 169, 572 N.E.2d at 89-90, wherein we cited the following passages in Fletcher v. Coney Island, Inc. (1956), 165 Ohio St. 150, 154-155, 59 O.O. 212, 214, 134 N.E.2d 371, 374-375:

"Where the General Assembly by statute creates a new right and at the same time prescribes remedies or penalties for its violation, the courts may not intervene and create an additional remedy. * * *

****328** "If the General Assembly has provided a remedy for the enforcement of a specific new right, a court may not on its own initiative apply another remedy it deems appropriate."

However, Fletcher, supra, involved a situation wherein this court held, and the parties to the litigation apparently agreed, that there would have been absolutely no cause of action or remedy for the conduct at issue in Fletcher (exclusion of an African-American from an amusement park) in the absence of legislation, and that any right of action by the plaintiff was exclusively within the province of the legislature. Id. at 153-154, 59 O.O. at 213-214, 134 N.E.2d at 373-374. Such is clearly not the case in the area of employment at will. See discussion infra. Moreover, unlike R.C. 4113.52, the statutes at issue in Fletcher (former R.C. ***161** 2901.35 and 2901.36) contained at least some language indicating a legislative intent to bar any further action above and beyond the remedies provided by statute. Id. at 153-154, 59 O.O. at 213-214, 134 N.E.2d at 373-374. Indeed, in Fletcher, at paragraph two of the syllabus, this court expressly held that the language of the statutes at issue in that case demonstrated "a plain purpose and intent on the part of the General Assembly to restrict the remedies or penalties available to those expressly provided."

It is also interesting to note that in Rheinecker, supra, 826 F.Supp. 256, 257, the federal district court relied on the case of

Commrs. V. Bank of Findley (1877), 32 Ohio St. 194, in a manner similar to the way the dissent in Trader indirectly relied on Zanesville and Fletcher. In Bank of Findley, at 200-201, this court stated: "In such case, the rule is, says Lord Mansfield, in Rex v. Robinson, 2 Burr. 803: 'That where a statute creates a new offense by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offense (not antecedently unlawful), by a particular sanction and a particular method of proceeding, that particular method of proceeding must be pursued and none other.'" (Emphasis sic.) However, in Bank of Findley, this court specifically noted that the remedy provided by the statute at issue in that case provided more than ample recovery for an aggrieved party and that the remedies were "full, adequate and complete." (Emphasis added.) Id., 32 Ohio St. at 200. Conversely, the remedies set forth in R.C. 4113.52 are neither ample nor complete.

[13] Finally, the right of this court to recognize a common-law cause of action and remedy for the wrongful discharge of an at-will employee cannot be seriously questioned. "After all, who presides over the common law but the courts?" Gallimore v. Children's Hosp. Med. Ctr. (1993), 67 Ohio St.3d 244, 253, 617 N.E.2d 1052, 1059. The employment-at-will doctrine was judicially created, and it may be judicially abolished. Clearly, it is the responsibility of the Ohio judiciary to determine whether sufficiently clear public policy reasons exist to support a common-law exception to the doctrine of employment at will (see Painter, supra, 70 Ohio St.3d at 384, 639 N.E.2d at 56) and to set the parameters of those exceptions. Today, we recognize such an exception on the basis of Greeley in circumstances where an at-will employee fully complies with the dictates of R.C. 4113.52 and is discharged or disciplined in violation of the statute. In so doing, we specifically find that the common-law remedies available under Greeley do not conflict with the limited statutory remedies available to a qualifying whistleblower under R.C. 4113.52. In addition, we also recognize a separate exception to the employment-at-will

doctrine where an employee is discharged or disciplined for reporting health and safety concerns to OSHA, and find this exception to be applicable regardless whether the employee had complied with the dictates of R.C. 4113.52 in reporting such matters to OSHA.

[14][15] ***162** Accordingly, we hold that an at-will employee who is discharged or disciplined for filing a complaint with OSHA concerning matters of health and safety in the workplace is entitled to maintain a common-law tort action against the employer for wrongful discharge/discipline in violation of public policy pursuant to Greeley, 49 Ohio St.3d 228, 551 N.E.2d 981, and its progeny. Thus, appellant is entitled to maintain a Greeley claim against appellees whether or not he complied with the dictates of R.C. ****329** 4113.52 in reporting his employer to OSHA. We also hold that R.C. 4113.52 does not preempt a common-law cause of action against an employer who discharges or disciplines an employee in violation of that statute. We further hold that an at-will employee who is discharged or disciplined in violation of the public policy embodied in R.C. 4113.52 may maintain a common-law cause of action against the employer pursuant to Greeley and its progeny so long as that employee had fully complied with the statute and was subsequently discharged or disciplined. The remedies available pursuant to R.C. 4113.52 for violations of the statute and the remedies available for the tort of wrongful discharge are cumulative. Therefore, an at-will employee who is discharged or disciplined in violation of R.C. 4113.52 may maintain a statutory cause of action for the violation, a common-law cause of action in tort, or both, but is not entitled to double recovery. Our holdings today necessitate that we overrule Phung, supra, 23 Ohio St.3d 100, 23 OBR 260, 491 N.E.2d 1114, which held that there exists no exceptions to the doctrine of employment at will for employees who are discharged or disciplined for whistleblowing. Id. at paragraphs one and two of the syllabus. While we believe that the enactment of R.C. 4113.52 overruled Phung, we now do so specifically in order to avoid any confusion.

Phung was decided before R.C. 4113.52 became the law, and before our pronouncements in Greeley and its progeny.

For the foregoing reasons, appellant's second proposition of law is well taken. We reverse that portion of the court of appeals' judgment which affirmed the grant of summary judgment against appellant on the claim of wrongful discharge in violation of public policy.

III
Emotional Distress

In his fourth proposition of law, appellant contends that the court of appeals erred in affirming the grant of summary judgment in favor of appellees on appellant's claims for negligent and intentional infliction of serious emotional distress. We disagree.

With respect to appellant's claim for negligent infliction of serious emotional distress, we can perceive of no basis for such a claim on the facts of this case. As we noted in Heiner v. Moretuzzo (1995), 73 Ohio St.3d 80, 85-87, 652 N.E.2d 664, *163 668-670, recovery for negligent infliction of severe emotional distress has typically been limited to instances where the plaintiff has either witnessed or experienced a dangerous accident and/or was subjected to an actual physical peril. As to appellant's claim for intentional infliction of emotional distress, we agree with the trial court and the court of appeals that even after viewing the evidence in a light most favorable to appellant, the record does not support a claim for intentional infliction of emotional distress under the standards set forth in Yeager v. Local Union 20 (1983), 6 Ohio St.3d 369, 374-375, 6 OBR 421, 426, 453 N.E.2d 666, 671-672.

Accordingly, we reject appellant's fourth proposition of law and affirm the judgment of the court of appeals upholding the grant of summary judgment in favor of appellees on appellant's claims for negligent and intentional infliction of serious emotional distress.

IV

Conclusion

For all of the foregoing reasons, we affirm the judgment of the court of appeals in part, reverse it in part, and remand this cause to the trial court for further proceedings consistent with our opinion.

Judgment affirmed in part, reversed in part and cause remanded.

RESNICK and FRANCIS E. SWEENEY, Sr., JJ., concur.

PFEIFER, J., concurs in syllabus and judgment only.

MOYER, C.J., and COOK and LUNDBERG STRATTON, JJ., dissent in part and concur in part.

PFEIFER, Justice, concurring in syllabus and judgment only.

I concur in the syllabus and judgment of the majority. I am pleased to see that a ****330** cause of action for whistleblowers has finally found its most fitting forum--the common law. See Contreras v. Ferro Corp. (1995), 73 Ohio St.3d 244, 251-253, 652 N.E.2d 940, 946-947 (Pfeifer, J., dissenting.). The Whistleblower Statute, R.C. 4113.52, was enacted only after this court failed to appropriately extend common-law protection in Phung v. Waste Mgt., Inc. (1986), 23 Ohio St.3d 100, 23 OBR 260, 491 N.E.2d 1114, a case which demonstrated that such protection was truly needed. The Whistleblower Statute was not a response to judicial action, but to judicial inaction. It was not an attempt to curb a common-law right, but to create a right where the common law had failed.

***164** At the same time we formally recognize a common-law cause of action for whistleblowers, it is important to recognize the cause of action's legal corollary. The entry of this cause of action into the common law must allow for the development of a wide range of reasonable defenses that will permit an employer to tell the whole story of a termination.

COOK, Justice, dissenting in part and concurring in part.

I concur only in Part III of the majority opinion. I

respectfully dissent from the majority decision to expand the R.C. 4113.52 remedies beyond those established by the General Assembly because the majority fails to persuade that its result is legitimately grounded in Ohio public policy. I also dissent because the plaintiff failed to withstand the summary judgment challenge of the employer.

I
THE REMEDY PROVIDED IN R.C. 4113.52 IS EXCLUSIVE

This decision by the majority is a troubling instance of this court elevating itself above the General Assembly as architect of Ohio's public policy. Rather than interpreting the Whistleblower Statute, the majority sets its own policy for the state based on the view of four justices that the statutory relief, as crafted by the branch of government charged with that decision, is not "ample [or] complete." The majority, because it disagrees with the legislative decisions to limit remedies provided in the state and federal statutes, acts beyond this court's constitutional authority to remedy the perceived shortcomings.

Pursuant to Greeley v. Miami Valley Maintenance Contrs., Inc. (1990), 49 Ohio St.3d 228, 551 N.E.2d 981, the majority purports to base an exception to at-will employment on "public policy" extracted from state and federal statutory provisions. Recognition of a Greeley claim in this case, however, does not act to further the public-policy determination of Congress or the General Assembly. Instead, it circumvents the specific remedies provided in those statutes.

As part of its rationale, the majority opinion takes license with the historical doctrine of employment at will. It postulates that at-will employment is a creature of common law, and therefore may be judicially abolished. Until today, however, the Ohio judiciary has never recognized a common-law protection against discharge for whistleblowing activity. Moreover, the Ohio

Constitution gives the legislature primary responsibility to protect the welfare of employees. Phung v. Waste Mgt., Inc. (1986), 23 Ohio St.3d 100, 103, 23 OBR 260, 262, 491 N.E.2d 1114, 1117.

As for the reliance on the Occupational Safety and Health Act of 1970 ("OSHA"), Section 651 et seq., Title 29, U.S.Code, it is questionable, even as a general proposition, to look to a federal statute as a source of Ohio public policy. ***165** The majority justifies its creation of a Greeley claim based on OSHA by referring to the "clarity" element contained in the model from Professor Perritt's law review article, and employed in the lead opinion in Painter v. Graley (1994), 70 Ohio St.3d 377, 384, 639 N.E.2d 51, 57. Without meaningful analysis of the relevant federal statute, the majority announces that OSHA creates a clear statement of public policy favoring "workplace safety" and Greeley thereby permits a cause of action for retaliatory discharge grounded in common law. Such reasoning is dubious in light of the fact that although Section 660(c), Title 29, U.S.Code provides whistleblowers a remedy ****331** for retaliatory discharge, that section does not provide whistleblowers with a private cause of action. Taylor v. Brighton Corp. (C.A.6, 1980), 616 F.2d 256. Instead, all claims are processed through the Secretary of Labor, who possesses broad authority to determine the investigatory and prosecutorial action to be taken. Id. at 261-262.[FN6]

FN6. The majority points to this court's opinion in Mers v. Dispatch Printing co. (1985), 19 Ohio St.3d 100, 19 OBR 261, 483 N.E.2d 150, as supported for its adoption of the "public policy" embodied in Section 660(c), Title 29, U.S.Code to create a cause of action cognizable in Ohio courts. The Mers citation of Section 660(c), however, was included to point out that at-will employment is not without exception. Id. at 103, 19 OBR at 263-264, 483 N.E.2d at 153, fn. 2. Mers was not a Greeley-type case authorizing relief based on the "public policy" embodied in a statute or comparable authority. Instead, Mers defined what inquiries were appropriate in determining whether an employment contract (implied or express) exists and recognized a cause of

action for at-will employees based on promissory estoppel. Section 660© was cited only as a statutory remedy available despite at-will employment. Mers did not suggest that a plaintiff could recover pursuant to Section 660© outside the limits of the federal remedy.

This court's creation of a Greeley claim based on the federal policy to promote "workplace safety" permits an employee to do in Ohio courts that which OSHA forbids in federal court--to bring a private cause of action. The majority adopts that portion of the federal public policy supporting its determination, while ignoring the policy-driven balancing components of that legislation. As a consequence, we are left with an exception to the employment-at-will doctrine purportedly grounded on federal public policy that is more transparent than it is clear.

The majority additionally states that "Ohio's public policy is clearly in keeping with the laudable objectives of the federal Occupational Safety and Health Act." While this may be true, the branch of government properly charged with making public-policy decisions--the General Assembly--has expressed Ohio's policy by enacting R.C. 4113.52. Like Section 660(c), Title 29, U.S.Code, Ohio's whistleblower statute recognizes an exception to at-will employment and sets the bounds of available relief.

In Contreras v. Ferro (1995), 73 Ohio St.3d 244, 652 N.E.2d 940, syllabus, we recognized that relief under the Whistleblower Statute requires strict compliance with the reporting dictates of R.C. 4113.52. Like the reporting requirements, the ***166** limited remedies contained in R.C. 4113.52(e) reflect the General Assembly's public-policy determination. Accordingly, the majority contravenes the General Assembly's expressions of public policy by authorizing whistleblower relief beyond the statutory limits.

The majority cites Collins v. Rizkana (1995), 73 Ohio St.3d 65, 70, 652 N.E.2d 653, 658, to support its determination that the "public policy" embedded in a statute may be extracted to defeat that statute's coverage provisions. [FN7] In Collins, this court recognized the right of an employee to maintain a Greeley claim

based on policy embodied in R.C. Chapter 4112, despite the fact that Collins's employer did not meet the statutory definition of "employer." Id. at 74, 652 N.E.2d at 661.

FN7. The majority also cites Helmick v. Cincinnati Word Processing, Inc. (1989), 45 Ohio St.3d 131, 543 N.E.2d 1212, as being supportive of this proposition. Helmick, however, held that intentional torts long recognized at common law, although keyed to sexual misconduct, were not preempted by the limited remedies available at that time pursuant to R.C. 4412.05(g). Id. at 134-135, 543 N.E.2d at 1216. In the instant case, we are not dealing with a common-law tort independent of the statutory violation. To the contrary, the Greeley claim is derivative of the statutory violation.

R.C. 4112.99, which provides the penalty for a violation under R.C. Chapter 4112, subjects a wrongdoer "to a civil action for damages, injunctive relief, or any other appropriate relief." Accordingly, the Collins court did not endorse an enlargement of statutory remedies beyond those provided in R.C. Chapter 4112. Unlike R.C. 4112.99, 4113.52(E) specifically limits the remedies available to a discharged whistleblower to reinstatement of employment, back pay, reinstatement of seniority and fringe benefits, litigation costs, attorney fees, and interest on back pay.[FN8]

[FN8]. The majority misreads R.C. 4113.52(E) when it states that "the statute permits the court to fashion an award based upon whatever the court deems to be appropriate." The pertinent portion of division (E) reads: "The court, in rendering a judgment for the employee in an action brought pursuant to division (D) of this section, may order, as it determines appropriate, reinstatement of the employee to the same position he held at the time of the disciplinary or retaliatory action and at the same site of employment or to a comparable position at that site, the payment of back wages, full reinstatement of fringe benefits and seniority rights, or any combination of these remedies." (Emphasis added.) Upon reading all the pertinent statutory language, it is clear that a court may order, as appropriate, any combination of the remedies listed in that

division. Division (E) does not authorize a court to award extra statutory remedies that it deems appropriate.

**332Moreover, the majority opinion in Collins carefully noted:

"We do not mean to suggest that where a statute's coverage provisions form an essential part of its public policy, we may extract a policy from the statute and use it to nullify the statute's own coverage provisions." Id. at 74, 652 N.E.2d at 661.

Disregarding the Collins court's caveat, the decision of the majority allows a Greeley claim based on the public policy of R.C. 4113.52, which defeats that *167 statute's coverage provisions. This result is achieved by recognizing a public policy to promote "workplace safety" favoring employees while ignoring the policy considerations reflected in R.C. 4113.52(E), which balances the statute by limiting the available relief. Despite the majority's assertions to the contrary, the expansion of whistleblower remedies does not come as a natural evolution of common law--it is in derogation of the common-law employment relationship. Under Greeley and its progeny, such an expansion can be accomplished only when acting pursuant to "sufficiently clear public policy," such as a statute or other comparable authority. Greeley, 49 Ohio St.3d at 233, 551 N.E.2d at 986; Painter, 70 Ohio St.3d at 384, 639 N.E.2d at 56.

Here the majority extracts an overly broad public policy from both R.C. 4113.52 and Section 660(c), Title 29, U.S.Code, while ignoring the specific remedies provided by those statutes. Such action is beyond this court's constitutional authority. See, e.g., State v. Smorgala (1990), 50 Ohio St.3d 222, 223, 553 N.E.2d 672, 674; State ex rel. Bishop v. Mt. Orab Village School Dist. Bd. Of Edn. (1942), 139 Ohio St. 427, 438, 22 O.O. 494, 498, 40 N.E.2d 913, 919; Primes v. Tyler (1975), 43 Ohio St.2d 195, 72 O.O.2d 112, 331 N.E.2d 723.[FN9]

FN9. It is noteworthy that the lead opinion in Painter, supra, echoed the following language from Smorgala, supra, 50 Ohio St.3d at 223, 553 N.E.2d at 674, in denying the Greeley

claim under consideration: "Where the General Assembly has spoken, and in so speaking violated no constitutional provision, the courts of this state must not contravene the legislature's expression of public policy. 'Judicial policy preferences may not be used to override valid legislative enactments, for the General Assembly should be the final arbiter of public policy.'" Painter, 70 Ohio St.3d at 385, 639 N.E.2d at 57.

The Trader Dissent

The majority impugns the dissent in Trader v. People Working Cooperatively, Inc. (1996), 74 Ohio St.3d 1286, 1286-1289, 660 N.E.2d 737, 737-739. I joined that dissent and I continue to support its analysis as judicious.

In criticizing the Trader dissent, the majority traces the controlling language from Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police (1991), 59 Ohio St.3d 167, 169, 572 N.E.2d 87, 89-90, which forms the cornerstone of Justice Wright's analysis, back to its origin. In Franklin Cty. Law Enforcement Assn., the majority quoted paragraph two of the syllabus in Zanesville v. Fannan (1895), 53 Ohio St. 605, 42 N.E. 703, which states:

"Where a statute which creates a new right, prescribes the remedy for its violation, the remedy is exclusive* * *."

As stated by the majority, the Zanesville court cited Dunn v. Kanmacher (1875), 26 Ohio St. 497, in addition to other authorities, in support of paragraph two of its syllabus. The majority declares that the "true" principle of law, as ***168** stated in Dunn, provides that "where a statute gives a new right, and also prescribes the remedy for its violation, the remedy so prescribed must be taken as exclusive, unless it appears from the statute that the legislature intended otherwise." (Emphasis added in Zanesville.) However, ****333** in applying the Dunn standard to this case, the majority reverses the presumption of exclusivity.

The majority concludes that the General Assembly did not

intend the R.C. 4113.52 remedy to be exclusive because it was not so labeled. Unlike the Trader dissent, the majority cites no statutory language or legislative history supporting its conclusion. It merely cites the absence of language making the limited remedies available in R.C. 4113.52 "sole and exclusive."

The majority relies heavily on the fact that R.C. 124.341 labels its remedy as "sole and exclusive," while R.C. 4113.52 does not. R.C. 124.341 provides public employees relief similar to that contained in R.C. 4113.52, and expressly labels itself as a public employee's "sole and exclusive" remedy. R.C. 124.341(D). Little, however, can be inferred from the absence of similar language in R.C. 4113.52.

For instance, it is possible that the General Assembly included the "sole and exclusive" language in R.C. 124.341 because that section comprehends parties subject to collective bargaining agreements, which generally provide grievance procedures as the exclusive remedy. Compare R.C. 4117.10(A) with R.C. 4113.53 (R.C. 4117.10[A] requires the General Assembly to specify when any other provision prevails over that section's general policy favoring resolution pursuant to an agreed-upon grievance procedure, while R.C. 4113.53 expressly permits private employees subject to a collective bargaining agreement to process their grievance through the channels provided in the agreement.). In any event, it is unsound to suggest that the "sole and exclusive" language was purposely excluded from R.C. 4113.52 to permit nonexistent alternative remedies. After all, the legislature enacted R.C. 4113.52 in response to this court's decision in Phung, supra, 23 Ohio St.3d 100, 23 OBR 260, 491 N.E.2d 1114, paragraph one of the syllabus, declaring that common law offered whistleblowers no protection against discharge from at-will employment.

Having traced the exclusivity presumption, the Trader dissent noted that whistleblower claims were not actionable at common law and that the enactment of R.C. 4113.52 was a legislative response to this court's holding in Phung. Trader, 74

Ohio St.3d at 1286-1287, 660 N.E.2d at 737. The dissent went on to present the legislative history of R.C. 4113.52, demonstrating that the General Assembly considered and rejected provisions for actual and punitive damages, Id. ***169** at 1287, 660 N.E.2d at 738, [FN10] and adopted Senate amendments, enacted in R.C. 4113.52(D), requiring that whistleblower remedies be limited to those identified in the statute. Id. at 1287, 660 N.E.2d at 738. [FN11]

FN10. Despite the majority's attempt to undermine the sound reasoning in the Trader dissent by pointing out that footnote 2 of Rheinecker v. Forest Laboratories (S.D.Ohio 1993), 826 F.Supp. 256, 258, was inaccurate and corrected in Rheinecker v. Forest Laboratories, Inc. (S.D.Ohio 1994), 855 F.Supp. 913, the majority concedes, as it must, that the General Assembly considered and rejected a broader range of remedies than those set forth in R.C. 4113.52(E). In fact, a review of H.B. No. 406 reveals that the bill, as introduced, would have authorized an award of actual damages, while the enacted version of that statute limits the available remedies to those listed in Division (E) of R.C. 4113.52.

FN11. As noted in footnote 2 to Trader, supra, 74 Ohio St.3d at 1287, 660 N.E.2d at 738, "The House accepted all Senate amendments to the bill. (142 Ohio House Journal 1581[March 10, 1988].) See R.C. 4113.52(E). This amendment distinguishes the whistleblower statute from statutes such as R.C. 4112.99, which authorizes a court to award specific remedies 'or any other appropriate relief.'"

By contrast, neither the appellant nor the majority in his stead has demonstrated legislative intent sufficient to overcome the presumption that R.C. 4113.52(E) is intended to provide a whistleblower with an exclusive remedy for violations of that section. Therefore, the remedy provided in R.C. 4113.52 must be taken as exclusive.

II

SUMMARY JUDGMENT

I also dissent on the basis that the trial and appellate courts correctly held that Kulch failed to withstand the summary judgment challenge of Structural Fibers. I am compelled to address these issues separately, ***334** given that the majority eviscerates summary judgment in order to reach its ultimate holding that expands Greeley and its progeny.

It is of critical importance to note at the outset that without the R.C. 4113.52(A)(2) claim, this case is indistinguishable from Contreras, 73 Ohio St.3d 244, 652 N.E.2d 940. Knowing that the plausibility of Kulch's Greeley claim is entirely dependent upon the (A)(2) claim, the majority permits its survival at the expense of the continued vitality of summary judgment practice.

For the reasons expressed in the dissent to Dresher v. Burt (1996), 75 Ohio St.3d 280, 299-302, 662 N.E.2d 264, 278-280, I would find that Structural Fibers satisfied its burden under summary judgment when it repeatedly asserted that it was entitled to judgment as to Kulch's entire R.C. 4113.52 whistleblower claim. As acknowledged by Kulch in his brief to this court, Structural Fibers specifically pointed to both the R.C. 4113.52(A)(1)(a) and the (A)(2) claims. In Kulch's brief, ***170** he admits "it is clear that a separate claim under section (A)(2) was made by plaintiff.* * * Even defendant pointed out that fact in its own summary judgment motion." (Emphasis added.)

Nonetheless, the majority, relying and expanding upon the plurality opinion in Dresher, holds that Structural Fibers is not entitled to summary judgment on Kulch's (A)(2) claim because Structural Fibers never discharged its burden to produce evidence to disprove it. This holding is specious in light of the fact that throughout the proceedings in this case, Kulch has argued his case solely as an R.C. 4113.52(A)(1)(a) claim. For example, prior to filing its motion for summary judgment, Structural Fibers argued under Civ.R. 12(B)(6) that Count One of the complaint failed to support Kulch's claim that his employer retaliated against him "'for

making any report authorized by division (A)(1) or (2).'" (Emphasis added.) In response, Kulch addressed only (A)(1)(a), citing that subsection at least nine times and never once citing (A)(2).

Moreover, oral argument before this court focused entirely on whether the reporting requirements of (A)(1)(a) had been followed and when the twenty-four hour waiting period of (A)(1)(a) commenced, without a single reference to (A)(2) or its reporting requirements.

Although Kulch now admits that he was on notice that Structural Fibers moved for summary judgment on his entire R.C. 4113.52 claim, Kulch never argued he could report directly to OSHA under (A)(2). If Kulch wanted to maintain his claim that (A)(2) permitted him to report directly to OSHA, he should have so argued in response to the motions to dismiss or for summary judgment rather than on appeal.

The majority's application of Dresher to hold that Structural Fibers should be denied summary judgment because it failed to disprove a claim that Kulch never identified further debilitates the purposes of summary judgment. Summary judgment allows the early assessment of the merits of claims, pre-trial dismissal of meritless claims, and defining and narrowing issues for trial. However, none of these goals can be accomplished if the plaintiff need not identify its specific theory of recovery.

As a result of the holdings in both Dresher and this case, to be entitled to summary judgment, defendant-movants must not only disprove plaintiff's case, they must also define plaintiff's case. In contrast, plaintiff-nonmovants have no duty to delineate their theories or to disclose the evidence to support them prior to trial. Instead, under the majority holding, it is the trial court that must identify all of plaintiff's possible claims and theories when considering summary judgment. If the lesson in Dresher was to object to interrogatories, the lesson here is to plead vaguely. Id., 75 Ohio St.3d at 302, 662 N.E.2d at 280 (Cook, J., dissenting). The majority errs in not requiring the same clarity and specificity

of *171 plaintiffs in their pleading and motion practice that it seeks to require of defendants.

Kulch's failure to demonstrate that his claims under the Whistleblower statute survived because he could directly report to OSHA under (A)(2) should prove fatal not only to the (A)(2) claim, but also to his Greeley claim. Contreras, supra.

**335III
CONCLUSION

In accordance with the foregoing, I would affirm the judgment of the court of appeals which affirmed summary judgment in favor of this employer on the Greeley claim.

MOYER, C.J., and LUNDBERG STRATTON, J., concur in the foregoing opinion.

END OF DOCUMENT

APPENDIX D

No. 95-650
1995 Term

THE SUPREME COURT OF OHIO

JAMES KULCH, *Appellant*,	)	
v.	)	**ENTRY**
STRUCTURAL FIBERS, INC., *Appellee*.	)	

This cause is pending before the Court as a discretionary appeal and as a claimed appeal of right. Upon consideration of appellant's motion to dissolve/lift stay and appellees' motion to strike,

IT IS SO ORDERED by the Court that the motion to dissolve/lift stay be, and hereby is, granted.

IT IS FURTHER ORDERED by the Court, sua sponte, that the discretionary appeal be, and hereby is, allowed. The Clerk shall issue an order for the transmittal of the record from the Court of Appeals for County, and the parties shall brief this case in accordance with the Rules of Practice of the Supreme Court of Ohio.

(Geauga County Court of Appeals; No. 93G1824)

/s/_____
THOMAS J. MOYER
Chief Justice

APPENDIX E

IN THE SUPREME COURT OF OHIO

CASE NO. 95-650

Appeal from the
Eleventh District
Case No. 93 G 1824

JAMES KULCH

Plaintiff-Appellant

vs.

STRUCTURAL FIBERS, INC., et al

Defendants-Appellees

MERITS BRIEF OF APPELLEE STRUCTURAL FIBERS, INC. et al

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Proposition of Law No. 1

Under R.C. 4113.52(A)(1), an employee who did not file a detailed written report with his employer before filing a report with public prosecuting authority fails to satisfy the mandatory statutory prerequisites to be afforded protection as a "whistleblower" regardless of whether or not he may have given oral notification to the employer. [R.C. 4113.52(A)(1) explained, Syllabus of Contreras v. Ferro Corporation, et al. (1995) 73 Ohio St.3d 244 applied] . . . . . [8]

Authorities in Support of this Proposition:

Bear v. Geetronics, Inc., (1992) 83 Ohio App. 3d, 163 at 167
Contreras v. Ferro Corp., et al, (October 28, 1993), Cuy. App. Nos. 64394/64424/64883
Contreras v. Ferro Corp., et al, (1995), 73 Ohio St. 3d 244
Moshier v. Jeg's High Performance, (1994), 99 Ohio App. 3d 236
29 U.S.C. 666(c), OSHA Sec. 11(c); 29 U.S.C. 666(e); 29 U.S.C. 666(f); 29 U.S.C. 666(g), 29 U.S.C. 666(h)(2)

Committee Minutes June 16, 1987; Committee Minutes May 14, 1987; Committee Minutes May 7, 1987
Gongwer News Service, Ohio Report No. 87, May 8, 1987
House Bill 406; House Bill 406, 6/29/87
Legislative Service Commission, June 4, 1987
Legislative Service Committee Minutes June 9, 1987
R.C. 4113.52(A)(1)(a); R.C. 4113.52(B)

Proposition of Law No. 2

> **A. When a litigant does not defend against a motion for summary judgment with evidence beyond the allegations or defenses of his pleading and has judgment entered against him, he is not permitted to assert the legal theory for the first time before the appellate courts.** [Civ. R. 56(E) applied]
>
> **B. When defending against a motion for summary judgment, a person seeking protection under R.C. 4113.52(A)(2) must produce evidence beyond the allegations and defenses of his pleading to show facts of his awareness about environmental crimes under R.C. Chapters 3704, 3734, 67109 or 6111 that he notified the public authority responsible for enforcement of those Chapters.** [Civ. R. 56(E) applied, R.C. 4113.52(A)(2) explained] . . . . . [18]

Authorities in Support of this Proposition:

Contreras v. Ferro Corp., et al., (October 28, 1993), Cuy. App. No. 64394/64424/64883
Hoffman v. Davidson, (1987) 31 Ohio St. 3d 60, 508 N.E. 2d 958
Kalish v. Trans World Airlines, (1977) Ohio St. 2d 73

Morris v. Children's Hospital Medical Center, (1991) 73 Ohio App. 3d 437
Riley v. Montgomery, (1984) 11 Ohio St. 3d 75
Shaw v. J. Pollock & Co., (1992) 82 Ohio App. 3d 656
Shephard v. United Parcel Service, (1992) 84 Ohio App. 3d 634
State Farm Mutual Auto Ins. Co. V. Latimore, (Nov. 5, 1992) Cuyahoga App. No. 63142
Vanfossen v. Babcock and Wilcox Company, (1988) 36 Ohio St. 3d 100, 522 N.E. 2d 489
Wing v. Anchor Media, Ltd. of Texas, (1991) 59 Ohio St. 3d 108
Civil Rule 56(E)
Gongwer News Service, Ohio Report No. 87, May 8, 1987
Memorandum written by Julianna F. Bull, Asst. Atty. Gen. to Rep. Dwight Wise dated January 13, 1988
Civil Rule 56(c)
R.C. 3734.01(J); R.C. 3704.01(D); R.C. 3704.01(E); R.C. 3704.03(A); R.C. 4113.52(A)(2)

Proposition of Law No. 3

Where the legislature has created a right and a remedy by statute for protection of conduct that was not protected at common law such as the whistleblower statute, R.C. 4113.51, *et seq.*, its remedy is exclusive and violation of the statute will not support a public policy wrongful discharge tort claim. [Greeley v. Miami Valley Maintenance Contractors, Inc. (1990), 49 Ohio St. 3d 228, 551 N.E.2d 981 explained] . . . . . [25]

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B) The Jeopardy Element . . . . . [32]

I) Exclusivity . . . . . [32]
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Authorities in Support of this Proposition:

Anderson v. Lorain County Title Company, (Ninth Dist. 1993), 88 Ohio App. 3d 376
Bear v. Geetronics, Inc., (1992) 83 Ohio App. 3d 163 at 167
Burress v. Sears Roebuck and Company, (S.D. Ohio, July 18, 1995) Case No. C-195-110, unreported 1995 W.L. 500874, 10 I.E.R. Cases 1470
Bush v. Lucas, (1983) 462 U.S. 367, 103 S.Ct. 2404 76 L.Ed. 2d 648
Bushman v. Mid Ohio Regional Planning Commission, (Dec. 7, 1995) Franklin App. No. 95APE03-249 unreported, 1995 W.L. 723546
Cisneros v. Birck, (April 11, 1995) Franklin App. No. 94APP 08-1255, unreported 1995 W.L. 222156
Clipson v. Schlessman, (1993) 89 Ohio App. 3d 230
Collins v. Rizkana, (1995) 73 Ohio St. 3d 65
Contreras v. Ferro Corp., et al., (October 28, 1993), Cuyahoga App. No. 64394/64424/64883, unreported
Contreras v. Ferro Corporation, et al., (1995) 73 Ohio St. 3d 244
Covell v. Spengler, 141 Mich. App. 76 at 83, 366 N.W.2d 76 (1985)
Cross v. Gerstenslager Company, 63 Ohio App. 3d 827, 589 N.E. 2d 466 (1989)
Dolan v. Continental Airlines, (1984) 208 Mich. App. 316, 526 N.W. 2d 922, 10 I.E.R.
Dudewicz v. Norris-Schmid, Inc., (N.D. Ohio, 1995) 874 F.Supp. 161

Greeley v. Miami Valley Maintenance Contractors, Inc., (1990) 49 Ohio St. 3d 228, 551 N.E. 2d 981
Haynes v. Zoological Society of Cincinnati, (1995) 73 Ohio St. 3d 254, 652 N.E. 2d 948
Haynes v. Zoological Society of Cincinnati, (Dec. 22, 1993), Hamilton Co. App. Nos. C910598, C-910635, 547 N.E. 2d 1048
Helmick v. Cincinnati Word Processing, Inc., (1989) 45 Ohio St. 3d 131
Holewinski v. Children's Hospital of Pittsburgh, (1994) 437 Pa *supra*, 174, 649A.2d 712 at 179
Hyatt v. Neaton Auto Products Mfg. Inc., (Ohio App. 1995), Case No. CA94-08-023, 1995k W.L. 469781
Kerans v. Porter Paint Co., (1991) 61 Ohio St. 3d 486
Murray v. Clinton Petroleum Company, (July 16, 1993) Portage App. No. 92-P-0086 unreported
Painter v. Graley, (1994) 70 Ohio St. 3d 377, 639 N.E. 2d 51
Perry v. Tioga County, (1994) 168 Pa Cnmwlth. 126, 649A.2d 186
Phung v. Waste Management, Inc., (1986) 23 Ohio St. 3d 100
Provens v. Stark Cty. Bd. Of Mental Retardation & Development Disabilities, (1992) 64 Ohio St. 3d 252, 261, 594 N.E. 2d 959
Ravel v. Wackeyhut Corp., (June 8, 1995) Cuyahoga App. No. 67459, 1995 W.L. 350077
Rheinecker v. Forest Laboratories, Inc., (S.D. Ohio 1993) at 13 F.Supp. 256 recon. Den. 826 F.Supp. 256
Ungrady v. Burns Intern. Sec. Services, Inc., (N.D. Ohio 1991) 767 F.Supp. 849
Vagts v. Perry Drugstores, Inc., (1993 204 Mich. App. 481 at 485, 516 N.W. 2d 102
Wings v. Anchor Media, Ltd. of Texas, (1991) 59 Ohio St. 3d 108

29 U.S.C. 666(c); 43 Pa. Stat. Ann. § 1421 (1986); House Bill 406
M.C.L. § 15.362; M.S.A. § 17428(2)
R.C. 4113.52(d); R.C. 4113.52; R.C. 4123.90; R.C. 4123.52(e)
Henry F. Perritt, Jr., *The Future of Wrongful Dismissal Claims:Where Does Employer Self Interest Lie?*, 58 University of Cincinnati Law Review (1989) No. 2 p. 397.

Proposition of Law No. 4

A. Under the tort theories for infliction of emotional distress a plaintiff must show the existence of emotional injury, its quality as being severe and debilitating, and its causation before liability for contemporaneous physical injury, if any, attaches. [Paugh v. Hanks, (1983) 6 Ohio St. 3d 72 Syllabus 3(a) applied]

B. A legitimate investigation into an employee's wrongdoing by an employer does not constitute conduct so outrageous in character and extreme in degree needed to establish liability for intentional inflication of emotional distress. [Yeager v. Local Union No. 20, (1983) 6 Ohio St. 3d 369, Syllabus applied.] . . . . . [39]

1) No Severe and Debilitating Injury Was Caused . . . . . [39]

2) No Extreme and Outrageous Conduct Occurred . . . . . [43]

Authorities in Support of the Proposition:

Bartlett v. Daniel Drake Mem. Hosp., (1991) 75 Ohio App. 3d 163 at 167
Boggs v. Avon Products, (1990) 56 Ohio App. 3d 67, 76
Crawford v. ITT Consumer Financial Corp., (S.D. Ohio 1986) 653 F. Supp. 1184, 1192
Criswell v. Brentwood Hospital, (1989) 49 Ohio App. 3d 163, 165
Foster v. McDevitt, (1986) 31 Ohio App. 3d 237
Hanley v. Riverside Methodist Hospitals, (1991) 78 Ohio App. 3d 73
Hatlestad v. Consolidated Rail Corp., (1991) 45 Ohio App. 3d 184
High v. Howard, (1992) 64 Ohio St. 3d 82
Kurts v. Harcourt Brace Jovanovich, (1990) 69 Ohio App. 3d 267
Lawyers Corp. Publishing Co. v. Mueuthing, (1992) 65 Ohio St.
Oswald v. Fresh Mark/Sugardale, Inc., (Nov. 9, 1992) Stark CA No. CA8906 (unreported)
Paugh v. Hanks, (1983) 6 Ohio St. 3d 72 Syllabus 3(a)
Plikard v. Mongeluzzo, (1992) 73 Ohio App. 3d 115
Russ v. TRW, Inc., (1991) 57 Ohio St. 3d 42
Smith v. Robins Beverage Groups, Inc., (September 3, 1991), Franklin County CA No. 90 AP 1022 (unreported)
Tohline v. Central Trust Company, (1988) 48 Ohio App. 3d 280
Yaeger v. Local Union No. 20, (1983) 6 Ohio St. 3d 369

CONCLUSION . . . . . [46]

CERTIFICATION OF SERVICE . . . . . [47]

APPENDIX TO APPELLEE MERITS BRIEF . . . . . [48]

* * * * *

[17]

criminal safety hazards are not protected by the Whistleblower Act.[13] A "violation" in R.C. 4113.52(A)(1)(a) is defined as follows:

> ...either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony. (Emphasis added.)

The phrase "physical harm to persons or hazard to public health or safety" are terms of art taken from the Ohio Criminal Code, Chapter 29. Legislative Service Commission letter, June 4, 1987 (TAB 22) and Committee Minutes June 9, 1987 (TAB 18). Appellant did not give Oral Notice about a felony or a criminal offense. He did not give Oral Notice of non-criminal OSHA complaint.[14] Ultimately, even if a *prima facie* case could be made, the objective basis of the discharge (videotaped cheating) would be a total defense over which there is no genuine issue of material fact. This issue was raised in the motion for summary judgment based on

---

[13]OSHA provides for criminal sanctions in only four situations:

1. Willful violations causing death. (29 U.S.C. 666(e))
2. Giving unauthorized advance notice. (29 U.S.C. 666(f))
3. Giving false information to the agency. (29 U.S.C. 666(g))
4. Killing, assaulting or hampering the work of a CSHO (Federal investigator). (29 U.S.C. 666(h)(2))

[14] Any sporadic vague gripes to various supervisors or co-employees Appellant may allege he made clearly do not satisfy the Oral Notice requirement since none were notifications of a violation of any criminal portion of OSHA and were not made before the January, 1991 OSHA filing.

undisputed facts and not reached because Plaintiff failed to achieve the protection of the statute.

Proposition of Law No. 2

> **A. When a litigant does not defend against a motion for summary judgment with evidence beyond the allegations or defenses of his pleading and has judgment entered against him, he is not permitted to assert the legal theory for the first time before the appellate courts. [Civ. R. 56(E) applied]**
>
> **B. When defending against a motion for summary judgment, a person seeking protection under R.C. 4113.52(A)(2) must produce evidence beyond the allegations and defenses of his pleading to show facts of his awareness about environmental crimes under R.C. Chapters 3704, 3734, 67109 or 6111 that he notified the public authority responsible for enforcement of those Chapters. [Civ. R. 56(E) applied, R.C. 4113.52(A)(2) explained]**

The only alternative for using the Oral and Written internal procedures to notify an employer before invoking law enforcement is contained in R.C. 4113.52(A)(2) which provides:

> (A)(2) If an employee becomes aware in the course of his employment of a violation of Chapter 3704., 3734., 6109., or 6111. Of the Revised Code that is a **criminal offense**, the

> employee directly **may notify**, either orally or in writing, any appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which he is engaged. (Emphasis added)

Similar to Division (A)(1)(a), this exception to the dual internal procedures for notifying an employer relates to criminal offenses but only in four specifically enumerated chapters.

In its motion for summary judgment, Appellee submitted the issue to the trial court on the lack of a genuine issue of material fact that appellant could not satisfy the statutory prerequisites for filing a lawsuit under R.C. 4113.52 and that he was terminated for legitimate reasons. (See Motions for Judgment on the Pleadings and for Summary Judgment.) In its brief in support Appellee argued that no criminal violation was established as required by the Whistleblower Statute. In making that argument, Appellee referred to allegations in both paragraphs 5 and 6 of the complaint about chemicals in the air and violations of OSHA and O.R.C. Chapters 3704 and 3734. (Defendant's Brief in Support, page 40.) Appellee also argued that there was neither Oral Notice nor Written Report made to the employer. In response, Plaintiff-Appellant made absolutely no reference to paragraph 6 of the complaint even though it was specifically referenced in the Motion. Appellant never referred to R.C. 4113.52(A)(2) as excusing him from the dual employer notification mandates of Division (A)(1)(a). Appellant now complains the Court failed to address Division (A)(2) even though he did not do so himself.

R.C. 4113.52(A)(2) does not apply here because (1) this legal theory was not raised below, and (2) Appellant did not satisfy his duty to oppose the motion with facts to support

every element of proof on which he would have the burden at trial.

A motion for summary judgment forces the nonmoving party to produce evidence as to any issue for which that party bears the burden of production at trial. Wing v. Anchor Media, Ltd. Of Texas, (1991) 59 Ohio St. 3d 108. The nonmoving party must present specific facts and not merely rely upon pleadings or conclusive allegations. Shaw v. J. Pollock & Co., (1992) 82 Ohio App. 3d 656. Civil Rule 56(E) provides that a party defending against the motion may not rest on his pleading:

> When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his responses, by affidavit or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. **If he does not so respond, summary judgment, if appropriate, shall be entered against him.** (Emphasis added)

Civ. R. 56(c) lists the type of documentary evidence admissible in summary judgments proceedings. In Hoffman v. Davidson, (1987) 31 Ohio St. 3d 60, 508 N.E.2d 958, this Court followed Civ. R. 56(E) emphasizing the nonmoving party's burden of production of evidence:

> As we held in Mathis v. Cleveland Public Library, (1984) 9 Ohio St. 3d 199, 202, 9 OBR 511, 514, 459 N.E.2d 877, 880, this rule clearly provides that plaintiffs were required to

> file opposing affidavits or some evidence to place in issue the facts alleged in the Davidson affidavit.

Id at 61, 508, N.E.2d at 960. *See also Wing*, paragraph 3 of the Syllabus, Vanfossen v. Babcock and Wilcox Company (1988), 36 Ohio St. 3d 100, 522 N.E.2d, 489, paragraph 7 of the Syllabus.

A party opposing a motion for summary judgment may not merely rely on his pleadings. Riley v. Montgomery, (1984) 11 Ohio St. 3d 75. Rather the opposing party has a duty to produce documentary evidence showing an issue of fact. Shephard v. United Parcel Service, (1992) 84 Ohio App. 3d 634. Failure to make a showing sufficient to establish an existence of an element that is essential in his case on which he bears the burden of proof mandates an entry of summary judgment. Morris v. Children's Hospital Medical Center, (1991) 73 Ohio App. 3d 437.

Appellant had the opportunity to argue that he was excused from the dual requirements of Division (A)(1)(a) because of Division (A)(2) and he did not. Secondly, Appellee's specific reference to paragraph 6 of the complaint that its argument that OSHA crimes were not involved, obliged Appellant to come forward with evidence to establish the nature of the criminal violation based upon any facts that Ohio law environmental crimes were involved. He failed to do that too.

Judge Nugent in *Contreras* explained R.C. 4113.52(A)(2):

[22]

> Finally, it is only in limited situations where an employee becomes aware of violations of environmental laws that an employee may provide notification directly to the appropriate authorities. R.C. 4113.52(A)(2). (Emphasis added.)

Contreras, p. 22.

The Senate version of the Bill listed several circumstances where an employee would be required to report violations directly to a public authority without first using the employer's internal procedures. As enacted, R.C. 4113.52(A)(2) was limited to violations of environmental laws of four specifically enumerated Chapters of the Revised Code.

The specific exception of the Division (A)(2) to the strict dictates of Division (A)(1)(a) was brought about due to concerns of the Attorney General who sought to include language that would assist in his prosecution of hazardous waste crimes. *Gongwer News Service*, (TAB 21, pg. 2). The Attorney General's office observed that half the cases initiated by the state involving violations of hazardous waste laws resulted from leads provided by employees of hazardous waste disposal firms. *Id.* The Attorney General urged that, an employee should be assured of statutory safeguards if an employee reports such violations directly to someone with authority to correct the violation (TAB 26).[15]

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[15]Memorandum written by Julianna F. Bull, Assistant Attorney General to Representative Dwight Wise dated January 13, 1988 which contained recommended language stating: "If the violation is one which represents a hazard to public health and safety, or is a violation of R.C. Chapter 3704, 3734, or 6111, the employee may directly notify, orally or in writing, the appropriate authority, with ability to correct the suspected violations." The language which was finally adopted left out references to

Appellant presented no evidence that the statutes listed in R.C. 4113.52(A)(2) applied (*i.e.*, O.R.C. Chapters 3704, 3734, 6109 and 6111). The only evidence there is about his complaint must be taken from the only report he made to the only agency he contacted. Appellant's OSHA complaint refers to "from chemicals in the air," in the "winding area of main plant." None of the Ohio Revised Code Chapters cited in R.C. 4113.52(A)(2) applies to the hazard description and its location as stated in Appellant's OSHA complaint.[16]

There is no evidence of a violation of Chapter 3734, Solid and Hazardous Wastes. Being airborne, hence gaseous, it is obviously not a "solid waste". It is also not a "hazardous waste"[17] which is defined as ". . .any waste or combination of wastes in solid. . .or contained gaseous form. . .". R.C. 3734.01(J)(TAB 10) The gas in the complaint was not contained, but was airborne ("in the air"). Thus, the substance of the OSHA complaint are not regulated by Chapter 3734.

Neither is there evidence that the condition about which Appellant complained a criminal offense violation of Chapter 3704 which deals with outside air. The purposes of

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a "hazard to public health or safety". This omission indicates that exceptions to the strict modification and reporting requirements of R.C. 4113.52(A)(1)(a) were in turn to be strictly construed and to apply only to the violations specifically enumerated in the specified Revised Code Chapters. *See, also, Gongwer News Service* (Tab B7, p.2).

[16] By his reference to "air", the complaint is not a violation of Clean Water Regulations, Chapters 6109 and 6111 and the complaint, paragraph 6, does not mention them.

[17] "Infectious wastes"are also regulated by this chapter. However, Appellees are probably entitled to judicial notice that the OSHA complaint is not about "infectious waste."

Chapter 3704 is for "the prevention, control, and abatement of air pollution", R.C. 3704.03(A) (TAB 8). "Air pollution" as defined in Chapter 3704 deals with is outside the building. Air pollution is ". . .the presence in the ambient air of one or more air contaminants. . ." R.C. 3704.,01(D) (TAB 7) "Ambient air", in turn, is defined in R.C. 3704.01(E) as "that portion of the atmosphere outside of buildings and other enclosures, stacks, or ducts that surrounds human, plant, or animal life, or property." The condition alleged in the OSHA complaint took place in the air inside "winding area of main plant." Hence, no violations of R.C. §§ 3704.05(A) through (K) (TAB 9) occurred and no criminal offense violations could have taken place.

To satisfy his obligation to defend against summary judgment, Appellant should have come forward with evidence that showed his complaint was not about chemicals inside the plant but involved outside air pollution or containers of gaseous waste, or any of the other criminal violations identified in those Chapters, (water pollution, fluorocarbons, automobile emissions, etc.). Appellant should also have provided evidence that there was a report to the Attorney General about environmental crimes. He did not. OSHA was the only public authority Appellant contacted.

Appellant did not invoke the excuse of Division (A)(2) for his failure to use the dual internal procedures required or to show that the criminal violation he claimed came under one of the Revised Code Chapters cited in Division (A)(2). The first time he referred to Division (A)(2) was in the Court of Appeals. The Court properly refused to consider it because it was a theory not raised below. Kalish v. Trans World Airlines, (1977) Ohio St. 2d 73. It is axiomatic that an Appellant "may not assert a new legal theory for the first time before the appellate court." State Farm Mutual Auto Ins. Co. v. Latimore (Nov. 5, 1992), Cuyahoga App. No. 63142 at 2,

1992 W.L. 328680. Appellee's proposition of law should be adopted.

Proposition of Law No. 3

> **Where the legislature has created a right and a remedy by statute for protection of conduct that was not protected at common law such as the whistleblower statute, R.C. 4113.51, *et seq.*, its remedy is exclusive and violation of the statute will not support a public policy wrongful discharge tort claim.** [Greeley v. Miami Valley Maintenance Contractors, Inc. (1990), 49 Ohio St. 3d 228, 551 N.E.2d 981 explained]

Greeley v. Miami Valley Maintenance Contractors, Inc. (1990), 49 Ohio St. 3d 228, 551 N.E.2d 981 and its progeny establish that, where the legislature has not specifically created an remedy for violation of clear public policy, a tort action arises upon employment termination proscribed by that policy. This case considers the obverse situation that, where the legislature created a right and a remedy, the legislated public policy does not support a *Greeley* claim.

* * * * *

[29]

Painter Syllabus 3.[20]

In Collins v. Rizkana, (1995) 73 Ohio St. 3d. 65, this Court stated that the clarity and jeopardy elements involve pure legal questions and are to be determined by the court while the jury determines issues of causation and justification.

A) The Clarity Element

Whistleblower cases under *Greeley* have difficulty with the clarity element. The legislative history has several facts that make it unique. First, R.C. 4113.52 it was created because there was no cause of action at common law protection for whistleblowers (*Phung, Wing*). Second, in the process of designing the statutory scheme, the legislature wrestled with the precise type of conduct it wished to protect. This Court in *Contreras* further explained that only with strict compliance to the statute's dictates does a person's conduct become a whistleblower, i.e., Oral Notice and Written Report chiefly. This Court noted in *Painter*:

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[20]This omission is purposeful. State constitutions, statutes, and administrative proceedings are sources of state public policy. The Federal Constitution is a source of state public policy at least through the Fourteenth Amendment. However, the statutes of the United States are not sources of state public policy as a general category. The Federal legislature and Federal courts are left to develop and interpret them and to determine which, if any, are applicable to states and how. Thus Plaintiff's reliance on Section 11(c) as a source of state public policy is not supported by *Painter* nor by our system of Federalism where the doctrines of preemption and the supremacy clause are at work. The Federal courts have determined that Section 11(c) does not have a private right of action; it is not for state courts to overrule them.

[30]

> Where the General Assembly has spoken, and in so speaking, violated no constitutional provision, the courts of this state must no contravene the Legislature's expression of public policy. "Judicial policy preferences may not be used to override valid legislative enactments for the]legislature] should be the final arbiter of public policy." Quoting State v. Sorgala, (1990), 50 Ohio St. 3d. 222 at 223, 553 N.E. 2d. 672 [Emphasis added]

Painter at 385.

APPENDIX F

IN THE SUPREME COURT OF OHIO

CASE NO. 95-650

Appeal from the
Eleventh District
Case No. 93 G 1824

JAMES KULCH

Plaintiff-Appellant

vs.

STRUCTURAL FIBERS, INC., et al

Defendants-Appellees

MERITS BRIEF OF APPELLANT JAMES KULCH

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Proposition of Law No. 1

If an employer receives oral or written notification from an employee of a claimed health or safety violation as described in R.C. §4113.52(A)(1)(a), and does not correct the violation or make a reasonable and good faith effort to correct the violation within 24 hours, the employee may file a written report with a regulatory official or agency as authorized by R.C. §4113.52(A)(1)(a). That filing invokes the protection of the whistleblower statute. R.C. §4113.52(A)-(B), explained . . . . . [3]

Proposition of Law No. 2

The Ohio Whistleblower Statute, R.C. §4113.52, does not pre-empt Greeley common law public policy tort claims involving whistleblowing. Greeley v. Miami Valley Maintenance Contractors, Inc., 49 Ohio St.3d 228 (1990), applied . . . . . [12]

Proposition of Law No. 3

A court addressing a summary judgment motion must consider not only the materials properly attached to the briefing in support and in opposition, but also all pleadings on file in the case. A court may not properly grant summary judgment on the ground that a party has not asserted a claim or theory in the lower court, where such claim or theory is plainly set forth in the complaint or other pleading properly on file. Rule 56(C), O.R.C.P., explained and applied . . . . [31]

Proposition of Law No. 4

A. In a claim for negligent or intentional infliction of extreme emotional distress, expert medical testimony is not essential to form the causal link between the outrageous conduct and the alleged resulting injury. Paugh v. Hanks, 6 Ohio St.3d 72 (1983), applied

B. A party asserting a claim for intentional infliction of emotional distress is not required to submit "medical testimony or evidence for treatment for serious emotional distress" in order to sustain the claim . . . . . [33]

CONCLUSION . . . . . [36]

CERTIFICATE OF SERVICE . . . . . [40]

* * * * *

[14]

A. Ohio has a clear public policy embodied in legislative enactments which prohibits retaliation against employees who engage in whistleblowing activities. (The *Clarity* Element)

The first question is whether Ohio has the clear public policy against whistleblowing. This Court has already found that Ohio has such a public policy prohibiting the discharge of whistleblowing employees:

> [T]he legislature quite properly reviewed the holding in Phung and asserted its power to make public policy by passing R.C. §4113.51 through §4113.53, which have the effect of modifying the common law.

Helmick v. Cincinnati Word Processing, Inc., 45 Ohio St.3d 131, 136 (1989).

Two Ohio statutes give expression to this policy. First, is the whistleblower statute itself, R.C. §4113.52. As recognized by the Court of Appeals in Haynes, "[i]n enacting the whistleblower's statute, the legislature has stated the strong public policy to protect whistleblowers." Haynes v. Zoological Society of Cincinnati, Nos. C-910598, C-910635 (Ct. App. Ohio, 1st Dist., Hamilton County December 22, 1993).

The second statutory enactment which expresses a public policy prohibiting whistleblower retaliation is the public employee whistleblower statute. R.C. §124.341. Enacted several years before R.C. §4113.52, this statute protects public employees who report certain violations to either the appropriate appointing authority or the applicable outside agency.

[15]

In addition to these Ohio statutes, a third statutory source of public policy against whistleblowing is the federal Occupational Safety and Health Act, 29 U.S.C. §660(c). 29 U.S.C. §660(c) provides as follows:

> (c) Discharge or discrimination against employee for exercise of rights under 29 USCS §§651 et seq.; prohibition; procedure for relief. (1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.

This section of OSHA is commonly referred to as an 11(c) violation. Notably, this statute does not provide the terminated employee with a private cause of action against the employer. Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980).

In addition to recognizing the existence of a clear public policy in Ohio opposing employer retaliation against an employee who reports illegal activity of safety concerns, it is equally important to articulate the rationale behind it. In undertaking this task, this Court does not need to write on a blank slate. The courts in our sister states have extensively discussed this issue. In Wagner v. City of Globe, 150 Ariz. 82, 722 P.2d 250 (1986), one of the earlier and most cited whistleblower cases, the Arizona Supreme Court discussed the rationale as follows:

Employees should not have to choose between their jobs and the demands of important public policy interests; thus, courts have developed the public policy exception to the at-will doctrine.

The tort of wrongful discharge in violation of public policy has been variously labeled: discharge for bad cause, retaliatory discharge, improper discharge, etc. Whatever the nomenclature, our concern remains the same: employees should not be discharged because they performed an act that

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APPENDIX G

No. 95-650
1995 Term

THE SUPREME COURT OF OHIO

JAMES KULCH, *Appellant*,	)	
v.	)	**(CORRECTED)** **ENTRY**
STRUCTURAL FIBERS, INC., *Appellee*.	)	

This cause is pending before the Court as a discretionary appeal and a claimed appeal of right. Upon consideration of appellant's motion to stay ruling on certification pending the decision in Supreme Court Case No. 95-405, Haynes v. Zoological Society of Cincinnati,

IT IS ORDERED by the Court that the motion to stay ruling on certification pending the decision in Supreme Court Case No. 95-405 be, and hereby is, granted.

/s/_____
THOMAS J. MOYER
Chief Justice

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No. 95-650
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THE SUPREME COURT OF OHIO

JAMES KULCH, *Appellant*,	)	
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IT IS ORDERED by the Court that the motion to stay ruling on certification pending the decision in Supreme Court Case No. 95-405 be, and hereby is, granted.

/s/_____
THOMAS J. MOYER
Chief Justice

APPENDIX H

IN THE SUPREME COURT OF OHIO

CASE NO.

Appeal from the
Eleventh District
Case No. 93 G 1824

JAMES KULCH

Plaintiff-Appellant

vs.

STRUCTURAL FIBERS, INC.

Defendant-Appellee

DEFENDANT-APPELLEE'S MEMORANDUM IN RESPONSE TO PLAINTIFF-APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION

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Counter Proposition of Law No. 1 . . . . . [4]

R.C. 4113.52(A)-(B) must be interpreted to require both oral and written notice to the employer in order to give significant to all provisions of the statute and its policy of voluntary compliance with laws.

Counter Proposition of Law No. 2 . . . . . [6]

The Whistleblower Statute pre-empts common-law public policy tort claims because Greeley v. Miami Valley Maintenance Contractors, Inc. (1990), 49 Ohio St.3d 228 only recognizes common-law torts in the absence of a statutory remedy for the activity which violates public policy.

Counter Proposition of Law No. 3 . . . . . [9]

The non movant who bears the burden of production at trial must respond to a motion for summary judgment and cannot ignore his affirmative duty to respond, and then raise an issue for the first time on appeal.

Counter Proposition of Law No. 4 . . . . . [11]

A party asserting a claim for intentional infliction of emotional distress must produce evidence of both the outrageousness of the conduct complained of and actual damage substantially and proximately resulting from the alleged offending conduct.

Expert testimony is necessary to establish a causal link between emotional distress and alleged resulting injuries wherever causation is beyond the expertise of the trier of fact.

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I. APPLICABLE STANDARD FOR SUPREME COURT OF JURISDICTION

The Ohio Supreme Court grants discretionary jurisdiction over appeals: 1) where a substantial constitutional question is involved; or 2) where the case is of "public interest or great general interest". See S. Ct. Prac. R. III91)(B) and III(2)(B)(2).

The present case does not satisfy this standard. No constitutional question has been raised. The second standard, "public interest or great general interest"does not apply because settled law controls each of the propositions of law raised by Plaintiff-Appellant such that to prevail Plaintiff-Appellant needs the repeal of express statutory language and the overruling of the vast weight of authority of the state and of federal decisional law interpreting law of the state. Plaintiff-Appellant has raised no adequate basis for such a wholesale change in Ohio law.

II. STATEMENT OF THE CASE

On December 31, 1991, James Kulch ("Appellant") filed this action against Structural Fibers, Inc. and ESSEF Corporation ("Appellee(s)" or collectively the "Company"). He alleged that he was terminated from employment in violation of Ohio's whistleblower statute, R.C. 4113.52 (herein "Whistleblower Statute")(T.d.1)[1] in retaliation for filing a complaint with the Occupational Safety and Health Agency (herein "OSHA"). Appellant also brought a common law wrongful discharge claim, a claim in tort under Greeley v. Miami Valley Maintenance Contractors, Inc. (1990), 49 Ohio St.3d 228 and emotional distress claims. On November 10, 1993, the trial court granted Appellees'

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[1]Abbreviated references herein are: "T.d." refers to transcripts of the docket from the Court of Appeals; exhibits attached to T.d. 77 below identified by a number only, e.g., "T.d. 77 Ex. 1".

motion with a written opinion (T.d. 97)[2]. On February 13, 1995 the Eleventh District Court of Appeals affirmed in all respects.

III. STATEMENT OF FACTS

Appellant was a fraud and cheat who jeopardized Appellee's products. When he was caught red handed and did not even make an excuse. He lied. He was suspended pending his discharge. Further investigation confirmed the deliberate nature of his acts, and he was discharged.

Structural Fibers manufactures fiberglass tanks for water storage used in well water systems. When Appellant became a Commercial Tank Finisher, a job was created in January 1991, his duties included the winding machine, one for which he never made medical limitations. He did not grieve. He did not move to another job made available to him. Without the fair play of letting Appellee know that he believed there was a problem with the chemicals in the winding area, so that the situation could have been addressed, he made a non-criminal safety complaint to OSHA. In fact there was no such safety problem.[3] He eventually trained on the winding job in August, still without medical limitations.[4] He botched the training but was not removed from his position. In the process he made life so miserable for his co-worker that the later

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[2]Part of that motion the court did not consider, was the merits of the discharge. Appellant had sought dismissal because the undisputed facts show that whistleblowing activity, if any, was not the cause of discharge but Plaintiff's blatant dishonesty. The trial court did not reach that alternative because no protected whistleblowing activity was shown under terms of the statute.

[3] In April, 1991, OSHA conducted air tests and an on-site inspection. The complaint about chemicals in the winding area, was not substantiated (T.d. 77 Ex 15, T.d. 77 Ex 16).

[4] The Company trained Appellant on the winder in July and August, 1991 for about a two week period. Notes were kept concerning the training process (cf T.d. 77 Ex 3).

complained to management.[5] This is how Appellant's fraud was gradually revealed and ultimately videotaped[6] When confronted by management, he denied not testing, a blatant lie.

All this evidence showed deliberate action of not testing and of concealing that fact and lying. The employee handbook provides that deliberate misconduct of this nature (e.g., concealing/dishonesty) amounts to 24 points whether considering the event as a whole or in its parts.

After being caught red-handed defrauding his employer of 15 years and being discharged, the Appellant had his second heart attack. His first heart attack occurred in 1990, before all of the events of 1991. The two trial courts below properly refused to protect him.

Shortly before his discharge, Appellant had filed a second Section 11(c) complaint with OSHA[7] but it was not served on

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[5] As a result, management (Heberer) asked the hourly shift leader to keep an eye on things for one day. On the following Monday, Appellant was given a two (2) point penalty for closing up early (T.d. 77 Ex. 29-30).

[6] The video taped pictures of October 14 and 15, 1991, shows Appellant did not pressure test any tanks with water except for 3 on Monday which he did with no difficulty in performing all of the steps (T.d. 77 Ex 35). The tanks that he did not test, he moved from the cleaning station to the testing station on a cart, put silicone on the ringed sleeve, threaded the sleeve into the hold on the tank, marked the tank, removed the sleeve and took the tank away to the staging area without ever inserting hoses, or water pressure. In effect, he did only those steps of the process that could be verified after-the-fact. He doctored up the tanks so they would look tested. He skipped his most critical function--THE WATER PRESSURE TEST. After the videotaping, his time cards for the two days and the assignment sheet (To Do List) for Tuesday were reviewed.

[7] Appellant had complained and sought safety shoe reimbursement for the purchase of fancy cowboy boots in September 1991 (T.d. 77 Ex 24).

Appellees until April, 1992. (T.d. 77 Ex 43) OSHA's investigation included his discharge by reviewing the video tape transcript and every fact available to the Court. (T.d. 77 Ex 44) OSHA concluded that there was no basis to find retaliatory discharge under the Act (T.d. 77 Ex 45)[8].

IV. ARGUMENT IN OPPOSITION TO JURISDICTION

Counter Proposition of Law No. 1

R.C. 4113.52(A)-(B) must be interpreted to require both oral and written notice to the employer in order to give significant to all provisions of the statute and its policy of voluntary compliance with laws.

R.C. §4113.52(A)(1)(a) provides in part:

> (A)(1)(a) If an employee becomes aware...[of a] **criminal offense**...or a **felony**, the employee **orally shall notify** [the employer official]...and **shall subsequently file** [with the same person] a **written report** that provides sufficient detail... If the employer does not correct the violation or make a reasonable good faith effort...the employee **may file a written report...with the prosecuting authority...**

The Oral Notice and the Written Report both are mandatory prerequisites to protection under R.C. §4113.52(A)(1). The Oral

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[8]Appellant also filed an earlier section 11(c)(1) retaliation complaint also dismissed by OSHA (T.d. 77 Ex. 17) which was investigated on June 7, 1991 after it was served. It related to an incident in March when most of his production had to be re-worked. (T.d. 77 Ex. 23).

Notice precedes the detailed Written Report to the employer and both are also prerequisites to the optional report to a prosecuting authority (herein Public Report). Bear v. Geetronics, Inc. (1992) 83 Ohio App. 3d 163; Murray v. Clinton Petroleum Company, (July 9, 1993), Portage County App. No. 92 P-0086 (unreported) refers to only one type of report, the Public Report dealing with environmental laws.

R.C. §4113.52(B) prohibits retaliation for "any report" authorized. The only "report," as used in the statute, are the Written Report and the Public Report[9]. Appellant would protect the optional Public Report under Division (A)(1) to the exclusion of the mandatory Written Report! If the Public filing is all that is necessary to achieve protection under Division (A)(1), the legislature had no need of the carefully crafted, intricate and mandatory strict procedure of precisely enumerated steps for employer notification or for a completely different procedure in Division (A)(2) that requires only the Public Report.

Courts should interpret the statute so as to give effect to all provisions of the statute and so as not to render any portion of the statute moot or irrelevant or redundant. East Ohio v. Public Utilities Commission (1988), 39 Ohio St.3d 295, 299. See also Scott v. Reinier (1979), 58 Ohio St.2d 67. Appellant argues that part of R.C. 4113.52 should be rendered redundant or meaningless.

R.C. 4113.52(A)(1) is not for the public exposure of violations of the law, but for providing an effective and prompt compliance in the workplace rather than only in court. The purpose of the two fold requirement of Division (A)(1) is explained in Bear v. Geetronics, Inc. (supra):

> [I]n order for an employee to invoke the protection offered by the statute, the employee is required to both orally notify a supervisor or other responsible officer of the employer of the violation and file a

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[9]The Senate which added the term "oral notification," did not alter the retaliation section to include that term.

> written report that supervisor or officer...The necessity that the employee fulfill both requirements is obvious.

...The written report...is required to show that notice of the violation was given and, equally as important, to provide the employer with the specific facts surrounding the infraction so that the employer may formulate and implement the necessary corrective measures.

Id. at 167.

In Contreras v. Ferro Corp. (October 28, 1993), Cuyahoga App. No. 64394, unreported, the court explained:

> A holding to the contrary, allowing an employee to notify the appropriate authorities of an investigation to ensure the reasonableness of a report prior to notifying the employee's supervisors or other responsible corporate officer, would eviscerate the "whistleblower" statute and the clear legislative intent of requiring notification to the company before going to the appropriate authorities.

Id at 26-27. Contreras is the same facts as this case, a plaintiff who went public before dealing with the employer.

Appellant did not file the mandatory Written Report about the presence of airborne chemicals in the winding area prior to his other OSHA filings. Appellant has no cause of action under R.C. 4113.52[10]

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[10] The courts below dismissed Appellant's complaint for failure to establish the pre-requisites to protected whistleblowing status. The court had alternatives even if the protected status were established. Reports of non-criminal safety hazards are not

[7]

Counter Proposition of Law No. 2

The Whistleblower Statute pre-empts common-law public policy tort claims because Greeley v. Miami Valley Maintenance Contractors, Inc. (1990), 49 Ohio St.3d 228 only recognizes common-law torts in the absence of a statutory remedy for the activity which violates public policy.

Count Two of Appellant's Amended Complaint alleges a public policy tort claim pursuant to Greeley v. Miami Valley Maintenance, Inc. (1990), 49 Ohio St.3d 228 on the basis of R.C. §4113.52. There is no legal basis for a Greeley action independent of this statutory remedy. Count Two was properly dismissed by the two courts below.

A Greeley action does not lie for a remedial statute. A remedial statute adopted by the legislature preempts the Greeley tort of public policy exception to employment at will.

In Wing v. Anchor Media Ltd. (1991), 59 Ohio St.3d 108, the Court chose not to find a Greeley action for that plaintiff's whistleblower-type complaint under a common law theory. It

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protected by the Whistleblower Act. OSHA provides for criminal sanctions in only four situations which do not apply here: (Section 17(e)), (Section 17(f)), (Section 17(g)), (Section 17(h)(2))

The record also establishes that Appellant did not give any advance oral notice or report about a felony or a criminal offense (as defined by the statute). Whatever sporadic vague gripes to various supervisors or co-employees Appellant may allege he made clearly do not satisfy the Oral Notice requirement since none were notifications of a violation of criminal portion of OSHA and were not made before January, 1991. Indeed, no Oral Notice was given with regard to any non-criminal OSHA complaint about chemicals in the winding area. Ultimately, if a prima facie case could be made, the objective basis of the discharge (videotaped cheating) would be a total defense over which there is no genuine issue of material fact.

reaffirmed Phung v. Waste Management (1986), 23 Ohio St.3d 100, after Greeley but before R.C. §4112.52 was enacted.

In Provens v. Stark Cty. Bd. Of Mental Retardation & Developmental Disabilities (1992), 64 Ohio St.3d 252, 261, the court distinguished Greeley type actions from the one before it. In Provens, public employees alleged a Greeley theory based upon the Ohio constitution for discrimination despite the fact that statutory remedies were available under R.C. 4112, 4117, and Chapter 124. The court rejected such a theory, because the employee had a statutory remedy. Similarly that fact distinguished Provens from Greeley. In Russell v. General Electric Co., (S.D. Ohio, January 1993) No. C-1-92-343, the Magistrate's recommendation, adopted by the court on February 23, 1994, held that Russell's Greeley action was preempted by the Whistleblower Statute. The Russell court explained the Whistleblower Statute, was enacted after Phung had held that no common law wrongful discharge action exists for whistleblower terminations and that the holding in Greeley has been narrowed by the U.S. District courts and the state appellate courts.

In Murray v. Clinton Petroleum Company (July 9, 1993), Portage County App. No. 92-P-0086 (unreported). The Court concluded that:

> Since the General Assembly has provided a specific procedure and specific remedies for the type of situation set for in R.C. §4113.52, **we find that R.C. §4113.52 preempts the formations of a public policy exception to the employee-at-will doctrine with the context of a "whistleblower" suit.** [citing Bear, supra.]

Id. at 2 (Emphasis added).

In Bear, supra, the plaintiff, like Appellant here, brought a cause of action under both R.C. §4113.52, and a Greeley based as did Contreras, (supra). Both held that the plaintiff's Greeley claim was preempted by R.C. §4113.52. The Contreras court stated:

[9]

> We therefore conclude that because R.C. §4113.52 provides certain procedures which an employee must follow and provides specific civil remedies available to an employee, a cause of action for **tortious wrongful discharge in violation of public policy for violation of the "whistleblower" statute does not exist.**

Id. at p. 17. (Emphasis added.)

Other than the vast weight of precedent[11], the rationale for statutory preemption of a Greeley claim was explained by Rheinecker v. Forest Laboratories, Inc. (S.D. Ohio 1993), 826 F. Supp. 256 (i.e., Rheinecker II).

> On the contrary, the applicable rule of statutory interpretation that must guide the court in reaching its conclusion, is the well settled principle that, 'where a statute creates a new right or imposes a new duty, and proscribes a remedy for its

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[11] Appellant relies on Haynes v. Zoological Society of Cincinnati (December 22, 1993) Hamilton Co. App. Nos. C910598, C-910635, 547 N.E.2d 1048, and Clipson v. Schlessman (1993), 89 Ohio App.3d 230. Both are poorly decided and contrary to Greeley as well as the overwhelming authority of Ohio appellate and federal court decisions to the contrary. They both incorrectly read Helmick v. Cincinnati Word Processing Inc. (1989), 45 Ohio St.3d 131. (See, supra Russell at p.23) Helmick actually supports the dismissal of Appellant's Greeley claim. The Helmick court held "that R.C. Chapter 4112 does provide the exclusive remedy for **pure** employment discrimination claims." Id. at 135 (Emphasis added). In this case, Appellant is alleging a **"pure"** Whistleblower (employment) claim and, per Helmick, the statute is **"exclusive."**, the rationale for statutory preemption of a Greeley claim was explained by Rheinecker v. Forest Laboratories, Inc. (S. D. Ohio 1993), 826 F.Supp. 256 (i.e., Rheinecker II).

> violation, the remedy thus proscribed is exclusive. In such case, it has been declared that the court can make such orders and render such judgment as the statute may point out, and no others' 85 Ohio Jur.3d, Statutes, §360. **As the Supreme Court of Ohio observed more than a century ago, where a statute creates a right where none existed before, that is, where the statute creates a new cause of action not available at common law by 'prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offense...by a particular sanction and a particular method of proceeding, that particular method of proceeding must be pursued and none other.'** [Citations omitted.]
>
> [W]e believe it is equally clear that where a new right is created or a new duty imposed by a statute and the statute prescribes a remedy for the enforcement of the right or duty, the remedy thus provided is exclusive.' **Therefore, as the Whistleblower Act created a new cause of action which did not exist at common law, "the remedy thus provided is exclusive."** [Citations omitted.]

Id. at p. 257. (Emphasis added.)

Other Ohio appellate and federal courts have also dismissed Greeley claims under similar statutes[12]. Anderson

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[12]To reverse on this issue would overrule these Ohio cases and disavow all the federal cases as well. See also, Murray, supra; Bear, supra; Ricciardi v. Babcock & Wilcox co., (January 27, 1993), Summit CA No. 15728 (unreported); Contreras v. Ferro Corp., supra, Anderson v. Lorain County Title Co., infra and Schwartz v. Comcorp, Inc., infra; Nienaber v. Hyper Shoppes,

v. Lorain County Title Company (1993), 88 Ohio App.3d 376, the (R.C. §4123.90); and Schwartz v. Comcorp, Inc. (January 14, 1993), Cuyahoga App. No. 63479 (unreported) 1993 WL 7920 (R.C. 4123.90); Napier v. VGC Corp. (S.D. Ohio, 1992), 797 F.Supp. 602; Pozzobon v. Parts for Plastics, Inc. (N.D. Ohio 1991), 770 F.Supp.376 (N.D. Ohio 1991), and Emser v. Curtis Industries, 774 F.Supp.1076. (R.C. §4112 claims). The weight of authority is that Greeley does not provide a duplicate cause of action in order to "supplement" or "fill in" remedies for injuries.

Counter Proposition of Law No. 3

The non movant who bears the burden of production at trial must respond to a motion for summary judgment and cannot ignore his affirmative duty to respond, and then raise an issue for the first time on appeal.

In response to Appellee's motion for summary judgment, Appellant never sought to excuse his failure to report to the employer by proof of elements under R.C. 4113.52(A)(2). However, he did raise this on appeal. R.C. §4113.52(A)(2) does

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Inc. (April 13, 1994) Hamilton CA No. C-930175 (unreported), Gall v. Quaker City Castings Inc. (N.D. Ohio 1995), 874 F. Supp. 161; Emser v. Curtis Industries, Inc., 774 F. Supp. 1076 (N.D. Ohio 1991); Pozzobon v. Parts for Plastics, Inc., 770 F. Supp. 376 (N.D. Ohio 1991); Provens v. Stark County Bd. Of Mental Retardation and Developmental Disabilities, 64 Ohio St.3d 252, 594 N.E. 2d 959 (1992); Reinecker v. Forest Laboratories 826 F. Supp. 256 (S.D. Ohio 1993); and Wilkerson v. Eaton Corp., et al. No. 65182, 1994 Wl 77719 (Cuya. App. Mar. 10, 1994). Michigan's similar Whistleblower Statute was held to be comprehensive enough to limit the remedies to the statutory ones with the result that the statutory remedy was held to be exclusive. Covell v. Spengler, 141 Mich. App. 76, 366 N.W.2d 76 (1985).

not apply here because (1) this legal theory was not raised below; (2) the statute and legislative history and cases are clear that only certain specific Ohio statutes are involved, not OSHA, and plaintiff admits he went to no agency except OSHA (3) the specific statutes listed have only to do with environmental conditions that occur outside of buildings, not chemicals inside buildings[13].

In Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, 526 N.R. 2d 802, and Wing v. Anchor Media (1991), 59 Ohio St. 3d 108, 570 N.E. 2d 1095, the Court endorsed the more rigorous standards of Celotex v. Catrett, (1986), 477 U.S. 317, 322-23. Reading Wing and Mitseff together establishes that the moving party must specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party to respond (Mitseff) and, once so stated, the non-moving party is forced to produce evidence on any issue for which he bears the burden of production at trial (Wing).

R.C. 4113.52(A)(2) was not raised in defense to Appellee's motion for summary judgement. Appellant "may not assert a new legal theory for the first time before the appellate court." Eagleye v. TRAW, Inc. (February 17, 1994), Cuyahoga App. No. 64662 (unreported), at p.5 citing State Farm Mutual Auto Ins. Co. v. Latimore (Nov. 5, 1992), Cuyahoga App. No. 63142 at 6, citing Kalesh v. TransWorld Airlines, Inc. (1977), 50 Ohio St.2d 73.

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[13] Appellant's complaint about "chemicals in the air" located in the "winding area of the main plant," is not a complaint about air pollution in the air outside the plant within the meaning of Chapter 3704. Chapter 3704 deals with air pollution ". . .the presence in the ambient air of one or more air contaminants. . ." R.C. §3704.01(D) "Ambient air", is defined in R.C. §3704.01(E) as "that portion of the atmosphere outside of buildings and other enclosures, stacks, or ducts that surrounds human, plant, or animal life, or property." Neither are they "contained wastes" regulated by Chapter 3734.

[13]

Counter Proposition of Law No. 4

A party asserting a claim for intentional infliction of emotional distress must produce evidence of both the outrageousness of the conduct complained of and actual damage substantially and proximately resulting from the alleged offending conduct.

Expert testimony is necessary to establish a causal link between emotional distress and alleged resulting injuries wherever causation is beyond the expertise of the trier of fact.

Negligent infliction of emotional distress claims are not recognized by Ohio law in the employment context. Hanley v. Riverside Methodist Hospitals (1991), 78 Ohio App.3d 73; Hatlestad v. Consolidated Rail Corp. (1991), 45 Ohio App.3d 184; Bartlett v. Daniel Drake Mem. Hosp. (1991), 75 Ohio App.3d 334; High v. Howard (1992), 64 Ohio St.3d 82; Lawyers Corp. Publishing Co. v. Meuthing (1992), 65 Ohio St. 273; Smith v. Robbins Beverage Groups, Inc. (September 3, 1991), Franklin County App. No. 90 AP 1022 (unreported).

Ohio recognizes the tort of intentional infliction of emotional distress in the employment context. Section 46(1) and (2) of the Restatement of Law 2d Torts (1965), and comments thereon were adopted to define emotional distress cases. Yeager v. Local Union 20 (1983), 6 Ohio St.3d 369, 374. Ashcroft v. Mt. Sinai Medical Ctr. (1990), 68 Ohio App.3d 359, 366 states its elements as follows:

1) intended serious emotional distress;
2) by conduct both extreme and outrageous;
3) proximate cause;
4) mental anguish suffered by plaintiff so serious that "no reasonable man could be expected to endure it".

Appellant has failed to meet the very high standard of Yeager, supra, and the Restatement. He cannot show is conduct which is "atrocious and utterly intolerable" that is unbearable by a normal person in the context of employment.

Written file entries particularly involving training and complaints (e.g., 1980, 1985) (T.d. 77 Ex 3-4) and notes taken by one (1) person, not a supervisor, relating to one (1) day's work are not an atrocity particularly where there is absolutely no evidence that Appellant knew about them. The uncorroborated allegation that a supervisor (not Appellant's), who had no connection with his discharge in October, once may have made a threat in April is, at worst, isolated and, if true, not an atrocity.

Similarly, there is absolutely no evidence that Appellant knew that he was being videotaped until after his termination. No television "cameras" were used (it was a cable lens) and the tapes revealed that most of the time Appellant was not even at his work station! (T.d. 77 Ex. 35) Moreover, videotape had been used in the part by Appellees (T.d. 77 Ex. 46). This is not an atrocity.

"The liability clearly does not extend to more insults, indignities, threats, annoyances, petty oppressions or other trivialities." Yeager at 374.

After the Company videotaped Appellant the first time (October 14th), the Company, in fairness, decided to videotape a second day in case Appellant's performance on the first day was an aberration. Further, in the interest of fairness, the Company met with Appellant to enable him to admit and/or explain why he did not test all tanks but marked and processed them as if he did or at least apologize. He did none of these. He outright lied. Appellant had the opportunity to grieve his discharge (which he did not do). He did not even appeal OSHA's dismissal of his retaliation complaint or denial of unemployment.

Even taking Appellant's distortions of the undisputed facts as true, there still is no evidence of "extreme and outrageous conduct" to preserve for trial. In Tohline v. Central Trust Company (1988), 48 Ohio App.3d 280, the court held that the employer's reasonable investigation of suspected theft did not amount to "extreme and outrageous conduct". A claim that a

discharge was for false or "trumped up" reasons does not constitute "extreme and outrageous" conduct where the employee's termination is handled in a civilized manner and where the employee had an opportunity to grieve the discharge. Smith v. Robins Beverage Group, Inc., (September 3, 1991) Franklin Cty. App. No. 90-AP-1022, unreported.

The definition of serious emotional distress in Paugh v. Hanks (1983), 6 Ohio St. 3d 72, paragraph 3(a) of the syllabus, states:

> Serious emotional distress describes emotional injury which is both severe and debilitating. Thus, serious emotional distress may be found where a reasonable person, normally constituted, would be unable to adequately with the mental distress engendered by the circumstances of the case.

Comment j to the Restatement of the Law, 2d (Torts) §46, states:

> The distress must be reasonable and justified under the circumstances, and there is no liability where the plaintiff has suffered exaggerated and unreasonable emotional distress, unless it results from a peculiar, susceptibility to such distress of which the actor has knowledge. "A reasonable person, normally constituted would not react in this manner".

It is for the trial court to determine in the summary judgment phase if a plaintiff has established an emotional distress claim by determining whether the distress alleged is serious as a matter of law. Oswald v. Fresh Mark/Sugardale, Inc. (November 9, 1992), Stark App. No. 8906 (unreported). A trial court may determine whether a complainant has stated a cause of action for tortious emotional distress by ruling whether the emotional injury alleged is serious as a matter of law." Kurtz v. Harcourt Brace

Jovanovich (1990), 69 Ohio App.3d 687.

The Paugh Court stated that:

> ****a court may decide whether a [plaintiff] has stated a cause of action by ruling on whether the emotional distress alleged is serious as a matter of law. *** We also observed with respect to questions of proof, expert medical testimony can assist the judicial process in determining whether the emotional injury is indeed serious.

Id. at 78, 80.

Courts have rejected many complaints as not causing severe or debilitating emotional distress. See, e.g., Gagne v. Northwestern Nat. Ins. Co. (C.A.6, 1989), 881 F.2d 309; Jones v. Washington (1990), 67 Ohio App.3d 176; McCarthy v. Cleveland Heights (1989), 65 Ohio App.3d 216; Lynn v. Allied Corp. (1987), 41 Ohio App.3d 392.

In response to Appellees' discovery request to "produce any and all medical records or other documents which support your emotional distress claim," Appellant produced nothing. In response to the Motion for Summary Judgment, Appellant produced nothing.

Ohio courts have dismissed claims of emotional distress by plaintiffs who never produced proof of medical attention or presented expert testimony. Davis v. Billow Co. Falls Chapel (1991), 81 Ohio App.3d 203, 208; Plikerk v. Mongeluzzo, supra at 126; Putka v. First Catholic Slovak Union (1991), 75 Ohio App.3d 741, 751; Kurtz v. Harcourt Brace Jovanovich (1990) supra; Sheets v. Rockwell International Corp. (1990), 68 Ohio App.3d 345, 355; Jones v. Washington (1990), 67 Ohio App.3d 176, 180-1; Holman v. Grandview Hosp. & Med. Ctr. (1978), 37 Ohio App.3d 151, 157 (diagnosis of depression may not be introduced by hearsay). Grote v. J.S. Mayer & Co. (1990), 59 Ohio App.3d 44, 47(summary judgment was upheld where plaintiff offered no expert testimony and the plaintiff's claim "involved proof of mental distress, and its cause or medically significant nature"). Jordan v. Elex, Inc. (1992), 82 Ohio App.3d 222, 230-1,

(expert medical testimony is needed to prove "future pain and suffering or permanency of subjective injury.)" See also, Consolidated Rail Corp. v. Gottshal (July 24, 1994), __ U.S. ___, 114 S. Ct. 2396, 62 USLW 4609, as to emotional injury:

> ***recognition of a cause of action for [emotional] injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified. The incident and severity of emotional injuries are also more difficult to predict than those of physical injuries because they depend on psychological factors that ordinarily are not apparent to the potential tortfeasors.

Id. at 2401 and 4313.

Appellant came forward with absolutely no evidence to causally relate his allegations to his second heart attack which he suffered two months after his termination for cheating. He showed no evidence that the heart attack was at all caused by an emotional state rather than a physical one (Appellant's first heart attack was in 1990, prior to all the events of 1991). Neither did he show the trial court evidence that the heart attack was causally related to the means of termination rather than the fact of termination.

With no evidence of "severe and debilitating" injury or "extreme and outrageous" conduct, Appellant's infliction of emotional distress was properly summarily.

Conclusion

For the above reasons jurisdiction should be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing has been served via U.S. regular mail this 28 day of April, 1995 upon Patrick J. Perotti, DWORKEN & BERNSTEIN CO. LPA, 153 E. Erie Street #304, Painesville, OH 44077.

/s/_____
Gregory P. Szuter

APPENDIX I

IN THE SUPREME COURT OF OHIO

CASE NO. ___

Appeal from the
Eleventh District
Case No. 93 G 1824

JAMES KULCH

Plaintiff-Appellant

vs.

STRUCTURAL FIBERS, INC.

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION OF PLAINTIFF-APPELLANT JAMES KULCH

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Proposition of Law No. 1

After a whistleblowing employee orally complains to their employer and it fails to act as described in R.C. §4113.52(A)(1)(a), the employee's filing of a written report with a regulatory official or agency as authorized by R.C. §4113.52 (A)(1)(a) invokes protection of the whistleblower statute, without any separate written report to the employer. R.C. §4113.52(A)-(B), explained . . . . . [5]

Proposition of Law No. 2

The Ohio Whistleblower Statute, R.C. §4113.52, does not pre-empt Greeley common law public policy tort claims involving whistleblowing. Greeley v. Miami Valley Maintenance Contractors, Inc., 49 Ohio St.3d 228 (1990), applied . . . . . [10]

Proposition of Law No. 3

A court addressing a summary judgment motion must consider not only the materials properly attached to the briefing in support and in opposition, but also all pleadings on file in the case. A court may not properly grant summary judgment on the ground that a party has not asserted a claim or theory in the lower court,

where such claim or theory is plainly set forth in the complaint or other pleading properly on file. Rule 56 (c), O.R.C.P., explained and applied . . . . [10]

Proposition of Law No. 4.

A. In a claim for negligent or intentional infliction of extreme emotional distress, expert medical testimony is not essential to form the causal link between the outrageous conduct and the alleged resulting injury. Paugh v. Hanks, 6 Ohio St.3d 72 (1983), applied.

B. A party asserting a claim for intentional infliction of emotional distress is not required to submit "medical testimony or evidence for treatment for serious emotional distress" in order to sustain the claim . . . . . [11]

IV. EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT PUBLIC OR GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION . . . . . [13]

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[1]

I. INTRODUCTION

Plaintiff was fired from his job of fifteen years when he complained orally to his employer and then in writing to OSHA about toxic chemicals in the air at the workplace. The main issue in this case was not presented in the Contreras or Haynes case. It is a more fundamental important question: **must an employee always file a written report with their employer in order to be covered by the Ohio whistleblower law?** The lower courts in this case answered the question yes, holding that a written report to the employer is required. However, the General Assembly made it clear that the answer is no, providing expressly in the whistleblower statute that an employee is protected not only if he files a written report with his employer, but equally if he orally complains to the employer and then files his written report to a public official or agency. See, R.C. §4113.52(A)-(B).[1]

That is what plaintiff did in the present case. He orally complained to his supervisor and the company president about the serious health problems that were occurring to him and numerous other employees from the toxic chemicals in the air at the

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[1] /"If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification **OR** the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail to identify and describe the violation with [a public official or regulatory agency].

. . .

Except as otherwise provided in division (c) of this section, no employer shall take any disciplinary or retaliatory action against an employee for making any report authorized [above]."

R.C. §4113.52(A) and (B). (Emphasis added)

workplace including nose bleeds, respiratory problems, skin rashes and other complications. When the employer responded by refusing to do anything and instead told him to "either work here or get a job somewhere else", he filed a written report with OSHA. The whistleblower statute specifically authorizes him to do this and specifically provides he will be protected from retaliation in doing so. See, R.C. §4113.52(A)-(B).

Despite this, the lower courts dismissed his complaint as a matter of law. That is in direct conflict with the statute. This court should resolve that conflict. It is improper to allow courts in this state to limit protection only to whistleblowers who file in writing with their employer, when the General Assembly has stated clearly in the statute that its protection also extends to whistleblowers who file written reports to a public official or agency after refusal by the employer to act on an oral complaint. See, R.C. §4113.52(A)-(B).

II. STATEMENT OF THE CASE AND FACTS

Since the decision below was based on a ruling of law and not fact, for the sake of brevity appellant will not submit a detailed factual outline and will rely on portions of the Court of Appeals' statement of the facts:

> "It is apparent that in late 1990, appellant started experiencing health problems that he believed were attributable to toxic chemicals in the air at his workplace. He complained of the condition orally to his employer as did others working in the area. In response, appellant claims that he was told, "Either work there or go somewhere else".
>
> "After receiving no satisfaction from his employer, appellant filed a written report with OSHA. OSHA performed an inspection of appellant's workplace which included air monitoring. It was determined that the air quality

was satisfactory but that other OSHA requirements had been violated. As a result, appellee was assessed a substantial fine.

> "Appellant maintains that after he filed his report with OSHA, retaliation against him by appellee was swift and severe. He alleges that co-workers were approached and asked to confirm the identity of the person who filed the complaint with OSHA. Co-workers were threatened not to associate with appellant or they would be in the same kind of trouble he was in and would "go down" with him. Additionally, his supervisors were ordered to write down everything that he did and everything that any co-workers said about him. He was also physically threatened by a supervisor for having complained to OSHA.
>
> "Appellant asserts that his supervisor began filing lengthy write-ups on him for his file. Appellant had worked for appellee for fifteen years and had only one problem which occurred in 1987. Yet in less than four months after appellant filed his complaint with OSHA, eleven separate reports were entered into his file.
>
> "Appellant was secretly filmed for two days at work in an attempt by appellee to catch him doing something wrong. Appellant's supervisor admitted that SFI had never used videotaping for anything other than suspected theft cases.

Court of Appeals' Opinion at 2-4. (Emphasis added).

The defendant-appellee disputed these facts and claimed that it took no retaliatory action against Mr. Kulch. It argued that Mr. Kulch was shortcutting his job and that it had fired him solely for violation of company work rules. However, plaintiff produced evidence which disputed those arguments and which also demonstrated that immediately after whistleblowing on defendant,

defendant physically threatened plaintiff and, contrary to a known doctor's restriction and company policy, ordered him to work in the area with the heaviest concentration of chemicals and with large tanks which he was restricted from lifting, making it clear that if he did not, he would be fired. As a result of this campaign against plaintiff, he suffered a massive heart attack.

The present action was filed in response to the foregoing and it involves three basic claims: I) a claim that plaintiff was fired in violation of Ohio's whistleblower statute, R.C. §4113.52, in retaliation for filing a written complaint with the Occupational Safety and Health Administration ("OSHA"); ii) a common law tort claim under Greeley v. Miami Valley Maintenance Contractors, Inc., 49 Ohio St.3d 228 (1990); and iii) an intentional infliction of emotional distress claim.

ISSUES PRESENTED

1. Should the courts limit protection of the Whistleblower Statute only to cases where employees have filed a written report with their employer?

Answer: No. The language of the Whistleblower Statute does not limit protection to employees who file written reports with the employer; rather, it specifically provides protection for employees who file "any report authorized by the statute", R.C. §4113.52(B), including written reports to a regulatory official or agency. R.C. §4113.52(A)(1).

2. Does the Whistleblower Statute, R.C. §4113.52, pre-empt the availability of common law Greeley tort claim?

Answer: No. The legislature specifically did not pre-empt common law claims in the private version of the whistleblower law, in contrast to the public version of the whistleblower law in which it did impose pre-emption.

3. Must a party asserting a claim of intentional infliction of emotional distress "submit medical testimony or evidence of treatment for serious emotional distress" where the injury caused is not emotional but physical, i.e., a heart attack?

Answer: No. A claim of intentional infliction of emotional distress is cognizable where the outrageous conduct results in severe emotional distress or bodily injury.

These issues are important not just to the present case but to all whistleblower cases on a statewide basis, since they deal with a question which must be addressed in every whistleblower action: is a written report to the employer necessary for the whistleblower statute to apply? Unless the courts are given an answer to that question, it is impossible to properly handle any whistleblower claim.

III. ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1

After a whistleblowing employee orally complains to their employer and it fails to act as described in R.C. §4113.52(A)(1)(a), the employee's filing of a written report with a regulatory official or agency as authorized by R.C. §4113.52 (A)(1)(a) invokes protection of the whistleblower statute, without any separate written report to the employer.

[5]

R.C. §4113.52(A)-(B), explained

The question presented in this case is whether an employee must always file a written report with his employer to invoke the protection of the Whistleblower Act? This question was not presented in Haynes or Contreras. This is a very important question because in most whistleblower cases employees complain to their supervisors orally and not in writing.

Simply put, does the law require an employee to file a written complaint to the employer, where the employee has already orally complained to management, and they have made it clear that they intend to do nothing?

The plain language of the whistleblower statute answers that question, "no". The General Assembly crafted this statute to provide an employee protection, without filing a written report to the employer, by allowing the employee to file his written report directly with a regulatory official or agency where he has already notified his company management orally and they have refused to act. See, R.C. §4113.52(A)-(B).

Specifically, R.C. §4113.52(A) provides:

> If an employee becomes aware in the court of his employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that his employer has authority to correct, and the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, the employee orally shall notify his supervisor or other responsible officer of his employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and

> good faith effort to correct the violation within twenty-four hours after the oral notification **OR** the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation where the violation occurred, with a peace officer, with the inspector general if the violation is within his jurisdiction, or with any other appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which he is engaged. (Emphasis added.)

R.C. §4113.52(B) provides:

> Except as otherwise provided in division © of this section, no employer shall take any disciplinary or retaliatory action against an employee for making any report authorized by division (A)(1) or (2) of this section or as a result of the employee's having made any inquiry or taken any other action to ensure the accuracy of any information reported under either such division. (emphasis added)

R.C. §4113.52(B) prohibits an employer from retaliating against an employee for making any report authorized by R.C. §4113.52(A)(1). Under R.C. §4113.52(A)(1), there are two authorized reports. One is a written report to the employer. See, R.C. §4113.52(A)(1)(a). The other is a written report to an agency, which an employee is authorized by the statute to make after waiting at least 24 hours following notification to the employer either in writing or orally. See, R.C. §4113.52(A)(1)(a). In short, once the employee notifies the employer orally and it refuses to act within the allowed time period, the statute authorizes the employee

to make a written report directly to an agency and thereby become protected by the statute, without any further notice or written report to the employer.

In the present case, plaintiff orally notified his supervisor and then, when nothing was done for several days,[2] he filed his written report with the agency as he was specifically authorized by R.C. §4113.52(A)(1) to do. That report triggers the protection of the statute. See, R.C. §4113.52(B).

The lower courts erred in this case by holding that the word "shall"[3] means that a written report must be submitted to the employer in all cases in order for protection to apply. As explained above, that is not what the statute says. The employee must file one of two reports to be protected: a report with the employer or a report with the agency. Where the employee complains only to the employer, the report must be in writing, thus the word "shall".[4] Where the employee follows the second and separate route allowed by the statute and files their written report with the agency, no separate writing to the employer is required.

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[2]/Defendant's response to Mr. Kulch's several complaints was "That's the job we got for you. Do the job." Kulch Dep. 158-159.

[3] /". . . the employee orally shall notify his supervisor or other responsible officer of his employer of the violation and subsequently shall file with that supervisor or officer a written report . . ." See, R.C. §4113.52(A)(1)(a).

[4]/The cases cited by the courts below in the instant case in support of their contrary holding were Bear v. Geetronics, Inc., 83 Ohio App.3d 163 (Butler Cty. App. 1992); Murray v. Clinton Petroleum Company, C.A. No. 92-P-0086 (Portage Cty. App. July 9, 1993); and Ungrady v. Burns International Security Services, Inc., 767 F.Supp. 849 (S.D. Ohio 1991). In all of those cases, however, the employee filed no written report with anyone: neither the employer nor the agency. The employee solely notified the employer orally, and filed a writing with no one.

The statute requires a prior notice to the employer before filing with the agency, but clearly states that the notice may be in writing or oral. The statute is worded in the disjunctive:

> . . .within twenty-four hours after oral notification or the receipt of the report, whichever is earlier, the employee may file a written report [with the public official or agency]. R.C. §4113.52(A)(1)(a).

In conclusion, the statute is not limited to protecting only cases where a written report is made to the employer. It specifically provides protection in that circumstance, but also protection where the employee files the written report with the agency after already orally notifying the employer and the employer refuses to act.

Summary. The record in the present case demonstrates that Mr. Kulch orally notified the employer of the problem and, when nothing was done, he filed a written report with the agency, as he was specifically authorized under the statute to do. R.C. §4113.52(A)(1). That is protected conduct. R.C. §4113.52(B).

This is the procedure followed by most workers. They complain orally to their supervisor. When the oral complaint is met with a flat refusal to act (which unfortunately happens frequently), the worker takes the reasonable and logical avenue of going in writing to a public regulatory official or agency.

The General Assembly recognized this and thus worded the statute to specifically permit the employee to follow this avenue and to receive whistleblower protection under the statute for doing so:

> If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification OR the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail

> to identify and describe the violation with [a public official or regulatory agency].
>
> . . .
>
> Except as otherwise provided in division (c) of this section, no employer shall take any disciplinary or retaliatory action against an employee for making any report authorized [above].

R.C. §4113.52(A) and (B).[5]

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[5] /It is respectfully submitted that the purposes of this law is not to "correct hazards". It is solely to protect employees who report suspected violations of the law. It is to protect them from retaliation or fear of discharge by their employers where they have brought dangerous or unlawful activity to the attention of the employer or appropriate authorities. See, Wing v. Anchor Media Ltd. of Texas, 59 Ohio St.3d 108 at Syllabus 4 (1991).

The written report provisions of this law have nothing to do with giving an employer sufficient notice in order to correct a violation. The purpose of requiring a written report is to ensure there is direct evidence that the employee made a complaint within the scope of the statute. The legislators considering this law were concerned that an employee fired for unrelated reasons could misuse this law by claiming that they previously complained about health and safety violations, when they did not. See, e.g., Tab B-1, B-2, B-7 ("super tenure") attached to Appellee's Brief. The legislature addressed that concern by providing that whistleblower protection would only be granted for filing any of the written reports authorized by the statute. The concern was not that the written report be made to the employer versus the agency, but that it be made. Where any report authorized under the statute is made (tothe employer or the agency), the protections of the statute are triggered. See, R.C. §4113.52(B). Consequently, the statute bars retaliation against employees for making any written report allowed bythe statute, whether to the employer or tothe agency. R.C.

§4113.52(B).

In summary, the existence of a written report -- whether filed with the employer, the agency, or drafted by the agency -- creates proof of the identity of the employee, the date of the complaint, and the violation alleged. That is the purpose of the written reporting requirement: to create documentary proof of these facts so that the statute cannot be misused by after-the-fact claims of compliance which are not documented.

A written report can occur and trigger the protection of the statute in any one of four ways. First, the employee can proceed under section (A)(1)(a) or (A)(3) and file a complaint in writing with the employer, which triggers the protection of the statute. The only reason the statute requires a written report here (i.e. "shall file") is because an employee solely using this avenue will not ultimately file a written report anywhere else. (Note that the defendant's attorney argues that where the employee has filed the written report with the employer, unless the employee also complains orally to the employer, there is no protection under the statute. This argument is ludicrous. The conduct which triggers protection under the statute is the filing of any written report, not oral notification. See, R.C. §4113.52(B).)

Second, the employee may orally notify his employer, and then file a written report directly with an agency, as specifically permitted by the statute. See, R.C. §4113.52(A)(1)(a). Third, the employee may give no notice to the employer and solely file a written report directly with an agency for those specific matters covers in section (A)(2) of the statute. See, R.C. §4113.52(A)(2).

Finally, the employee may give no notice to the employer and solely make an oral report directly to an a gency for those specific matters covered in section (A)(2) of the statute. See, R.C. §4113.52(A)(2). In this instance, it may appear that the employee would not be protected. It is suggested that protection does exist, however, because although the employee does not draft a written report himself, an oral complaint to the agency will result in the agency generating a written report itself, so that there will exist the necessary writing, containing all of the information needed to fulfill the purpose of the written report: i.e., written proof of the identity of the employee, the date of the complaint, and the violation alleged.

Proposition of Law No. 2

The Ohio Whistleblower Statute, R.C. §4113.52, does not pre-empt Greeley common law public policy tort claims involving whistleblowing. Greeley v. Miami Valley Maintenance Contractors, Inc., 49 Ohio St.3d 228 (1990), applied.

This exact issue is already pending in Haynes v. Zoological Society, Supreme Court No. 94-405, which was recently argued. Therefore, appellant has contemporaneously filed the attached motion (Appendix D) with this Court to stay ruling on the certification of the Greeley issue in this case pending the outcome of the Haynes decision. See, S. Ct. Prac. R. III, Section 5(D).

Proposition of Law No. 3

A court addressing a summary judgment motion must consider not only the materials properly attached to the briefing in support and in opposition, but also all pleadings on file in the case. A court may not properly grant summary judgment on the ground that a party has not asserted a claim or theory in the lower court, where such claim or theory is plainly set forth in the complaint or other pleading properly on file. Rule 56 (c), O.R.C.P., explained and applied.

R.C. §4113.52(A)(2) is a separate part of the whistleblower law dealing with whistleblowing about certain Revised Code sections on pollution and air contamination (i.e., "Chapter 3704, 3734, 6109 or 6111"). Section (A)(2) requires no notification at all (written or oral) to the employer; no twenty-four hour waiting period; and permits the employee to report directly to the regulatory agency and be covered by the whistleblower statute for doing so. R.C. §4113.52(B).

Plaintiff specifically made a claim under this section in his complaint at ¶6, "These activities, conditions and company policies at the work place constitute a violation of various state and federal laws including but not limited to the Occupational Safety and Health Act of 1970 and Ohio Revised Code Chapters 3704 and 3734." Yet, the Court of Appeals held that "appellant never argued this theory in the trial court" and dismissed appellant's entire claim thereon.

This is completely incorrect. Lower courts need to be instructed that they must consider the pleadings as that term is defined in Rule 7(A), O.R.C.P., which are properly on file in a case when a summary judgment motion is pending. They should be instructed that a claim may not be dismissed on the ground that the claim or theory was not raised in support or in opposition to the summary judgment motion, where the theory or claim is clearly set forth in the pleadings on file with the Court.

Proposition of Law No. 4.

A. In a claim for negligent or intentional infliction of extreme emotional distress, expert medical testimony is not essential to form the causal link between the outrageous conduct and the alleged resulting injury. Paugh v. Hanks, 6 Ohio St.3d 72 (1983), applied.

B. A party asserting a claim for intentional infliction of emotional distress is not required to submit "medical testimony or evidence for treatment for serious emotional distress" in order to sustain the claim.

The facts in this record easily satisfy the outrage element of the tort of intentional infliction of emotional distress, and the

lower courts erred in holding to the contrary.[6]

The more important question presented, however, deals with whether a party is required to submit "medical testimony or evidence of treatment for serious emotional distress" in order to sustain this type of claim.

The answer to that question should be no. First, such a rule would engraft a "medical evidence" requirement on intentional infliction of emotional distress cases which does not exist in

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[6] /The record in the present case demonstrates the following conduct by defendant in response to Mr. Kulch complaining about and reporting toxic chemicals in the air at the workplace: Defendant threatened co-workers not to associate or talk with Mr. Kulch or they would be in trouble and "would go down with him". See, Exhibit "B" to Summary Judgment Brief. Defendant ordered supervisors to follow him around and write down everything he did, something which they did with no other employees. Deposition of Plant Manager Tim Heberer, 307. They filled his file with lengthy, typewritten negative file entries and write-ups, something which they admit was never done prior to him reporting them to OSHA. Heberer Dep. 284-287. They threatened him that they would "punch his lights out" for having gone to OSHA. Kulch Affidavit ¶8. They installed a hidden T.V. camera and began to film him without his knowledge, something which they never did before in the history of the company. Heberer Dep. 130. They made the threat clear to him that he would soon lose his job of 15 years -- his sole means of support for himself and his family. Knowing that he hard time breathing from the chemicals and was under a doctor's restriction against heavy lifting, defendant ordered him directly to the part of the plant which had the heaviest concentration of chemicals in the air and the heaviest tanks to lift. Heberer Dep. 94-95; and see, Appellee's Brief at P7. This was in direct violation of defendant's admitted company policy that an employee who did not want to work with the chemicals could transfer out. When Mr. Kulch asked several times to transfer away from this, the defendant refused and told him "this is the job you were paid to do." See, Appellee's Brief at P7. All of these tactics and harassments predictably put Mr. Kulch under extreme emotional and physical stress, and he suffered a massive heart attack shortly after this campaign against him. This is certainly serious physically injury. See, Kulch Aff. At ¶16. The defendant offered no evidence to the contrary.

negligent infliction of emotional distress cases. See, e.g., Paugh v. Hanks 6 Ohio St.3d 72 (1983); Foster v. McDevitt, 31 Ohio App.3d 237, 239 (Montgomery Cty. App. 1986); Akron-Canton Waste Oil v. Safety-Clean, 81 Ohio App.3d 591, 606 (Summit Cty. App. 1992).

Second, allowing such a rule to be followed by the lower courts in Ohio would ignore the fact that an intentional infliction claim is available for either serious emotional distress or bodily injury. See, Yeager at Syllabus 1. There was no evidence in the present case of "treatment for serious emotional distress" because plaintiff did not suffer a nervous breakdown from this harassment and retaliation, he suffered a heart attack.

These important questions range beyond merely employment law cases. Emotional distress claims are raised in many types of actions, and the foregoing questions affect the handling of such claims across-the-board. This Court's guidance is therefore needed on these questions.

IV. EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT PUBLIC OF GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This Court is presently addressing two cases dealing with whistleblower matters.[7] However, neither case addresses the basic and fundamental issue raised by the instant matter, an important question which must be addressed in all whistleblower cases: does the whistleblower statute only apply if an employee files a written report with the employer?

The General Assembly answered that question with a clear

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[7]/The first deals only with whether a Greeley claim is available in this area, not with the operation of the whistleblower statute itself. The second only addresses a limited and technical issue on whether a management employee is covered by the statute, and whether there is an order in which complaints must be made.

"no". They worded the whistleblower law to give an employee protection not only for a written report to the employer, but equally for a written report to an outside regulatory official of agency which the statute specifically allows the employee to file where they have already orally complained to the employer but it has refused to act. See, R.C. §4113.52(A)(1)(a). The ruling in the present case which holds the opposite creates confusion -- not only for this case but for all cases, by setting bad law on an issue which must be addressed in every whistleblower case.

There is a public policy in Ohio to protect whistleblowers,[8] but in order for the whistleblower statute to operate properly, we must all know when its protections apply. By answering this question, this Court enforces the law as the legislature wrote it, making it clear to employers in this state that persons will be protected from retaliation not only when they file a written report with the company, but equally when they have orally complained to the employer and it refuses to act and they then file a written report with a public agency or official. The General Assembly has made it clear in the statute that it intends to allow employees to do this, and that it intends to grant them protection for doing this. See, R.C. §4113.52(A)-(B).

Finally, the actions of an employer in response to whistleblowing of threatening an employee with physical harm; telling other employees to stay away from him or they would "go down with him"; ordering supervisors to follow him around and write down everything he does in order to find a reason to get rid of him; installing secret video cameras to tape him; ordering him into the area of highest concentration of chemicals and heavy lifting, knowing that he cannot breath in those areas and has a doctor's restriction against such lifting; all resulting in a massive heart attack from this campaign of harassment and retaliation, certainly constitutes intentional infliction of emotional distress under Ohio law. The holding by the Court of Appeals to the contrary, and their suggestion at oral argument that this tort only

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[8] /See, Helmick v. Cincinnati Word Processing, Inc., 45 Ohio St.3d 131 (1989).

applies "when a person does something similar to what was done at the concentration camps in Nazi Germany" is an outrage in itself that should be corrected by this Court. In short, the Russ[9] rule should be elaborated to better explain the circumstances which satisfy the outrage element; to explain that medical evidence is not required in the claims; and to explain that proof in this claim is satisfied where the employee suffers a physical injury such as a heart attack.

Respectfully submitted,

/s/_____
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CERTIFICATE OF SERVICE

A copy of the foregoing was sent to Gregory P. Szuter, attorney for defendant-appellee, 75 E. Market Street, Akron, Ohio 44308, by regular U.S. mail, postage prepaid, this 30th day of March, 1995.

/s/_____
Patrick J. Perotti
DWORKEN & BERNSTEIN CO., L.P.A.
Attorney for Plaintiff-Appellant

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[9] /Russ v. TRW, Inc., 59 Ohio St.3d 42 (1991).

APPENDIX

Opinion of the Geauga County Court of Appeals (February 18, 1995) . . . . . App. A

Judgment Entry of the Geauga County Court of Appeals (February 18, 1995) . . . . . App. B

Journal Entry of the Geauga county Court of Common Pleas (November 10, 1993) . . . . . App. C

Motion to Stay Ruling on Greeley Certification pending merits decision in Haynes v. Zoological Society, Supreme Court No. 94-405 . . . . . App. D

APPENDIX J

No. 93-G-1824

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

JAMES KULCH, *Plaintiff-Appellant*,	)	
v.	)	**JUDGMENT ENTRY**
STRUCTURAL FIBERS, INC., et al., *Defendants-Appellees.*	)	

For the reasons stated in the Opinion of this Court, appellant's assignments of error are without merit, and it is the judgment and order of this Court that the judgment of the trial court is affirmed.

/s/_____
JUDGE EDWIN T. HOFSTETTER,
Ret. Eleventh Appellate District,
Sitting by assignment.
FOR THE COURT

CACIOPPO, J., Ret.,
Ninth Appellate District
sitting by assignment.

COURT OF APPEALS

ELEVENTH DISTRICT

GEAUGA COUNTY, OHIO

JUDGES
HON. DONALD R. FORD, P.J.,
HON. EDWIN T. HOFSTETTER, J.,
Ret., Eleventh Appellate District,
sitting by assignment,
HON. MARY CACIOPPO, J.,
Ret., Ninth Appellate District,
sitting by assignment.

JAMES KULCH,
Plaintiff-Appellant,

CASE NO. 93-G-1824

-vs-

STRUCTURAL FIBERS, INC.,
et al.,
Defendants-Appellees.

OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas Case No. 91 P 001049

JUDGMENT: Affirmed.

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(For Plaintiff-Appellant)

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HOFSTETTER, J.

On December 31, 1991, appellant, James Kulch filed this action against his former employer, appellee, Structural Fibers, Inc. ("SFI"). Appellant alleged that he was terminated without cause in violation of Ohio's whistle-blower statute, R.C. 4113.52, in retaliation for filing a complaint with the Occupational Safety and Health Agency ("OSHA"). Appellant also brought a common law wrongful discharge claim; a claim in tort under *Greeley v. Miami Valley Maintenance Contrs., Inc.* (1990), 49 Ohio St.3d 228; an infliction of emotional distress claim; and a wrongful denial of medical coverage claim.

Appellee filed a notice of removal to federal court, claiming that the case was preempted by the Employee Retirement Income Security Act ("ERISA"). The federal court remanded the case to common pleas court after finding that no ERISA claims were involved.

On May 15, 1992, appellee filed a motion to dismiss on the basis that appellant, as a matter of law, could not maintain his causes of action. The trial court overruled appellee's motion on July 6, 1992. On October 1, 1993, appellee filed a motion for judgment on the pleadings and for summary judgment. Appellee's motion for summary judgment was granted on November 10, 1993.

It is apparent that in late 1990, appellant started experiencing health problems that he believed were attributable to toxic chemicals in the air at his workplace. He complained of the condition orally to his employer as did others working in the area. In response, appellant claims that he was told, "Either work there or go somewhere else."

After receiving no satisfaction from his employer, appellant filed a written report with OSHA. OSHA performed an inspection of appellant's workplace which included air monitoring. It was determined that the air quality was satisfactory but that other OSHA requirements had been violated. As a result, appellee was assessed a substantial fine.

Appellant maintains that after he filed his report with OSHA, retaliation against him by appellee was swift and severe. He alleges that co-workers were approached and asked to confirm

the identity of the person who filed the complaint with OSHA. Co-workers were threatened not to associate with appellant or they would be in the same kind of trouble he was in and would "go down" with him. Additionally, his supervisors were ordered to write down everything that he did and everything that any co-workers said about him. He was also physically threatened by a supervisor for having complained to OSHA.

Appellant asserts that his supervisor began filing lengthy write-ups on him for his file. Appellant had worked for appellee for fifteen years and had only one problem which occurred in 1987. Yet in less than four months after appellant filed his complaint with OSHA, eleven separate reports were entered into his file.

Appellant was secretly filmed for two days at work in an attempt by appellee to catch him doing something wrong. Appellant's supervisor admitted that SFI had never used videotaping for anything other than suspected theft cases.

Appellee, on the other hand, argues that it took no retaliatory action against appellant. Appellee contends that closer scrutiny of appellant's work began after a co-worker suggested that appellant was taking shortcuts on his job. Part of appellant's job consisted of water pressure testing of fiberglass tanks. Appellee asserts that appellant had been falsely indicating on his time card that he had tested a certain number of tanks on his shift when, in actuality, he had tested fewer tanks. Appellee maintains that the only way to verify this information was to set up a video camera at appellant's work area.

When appellant was confronted with allegations that he falsified records, appellee claims that appellant did not admit or deny the allegations, nor did he offer an excuse. Because of appellant's alleged falsification of records, he was suspended. Appellee points to the employee handbook which provides that concealing information or dishonesty are grounds for immediate termination.

Appellee specifically denies acting in a retaliatory manner. Appellee denies even knowing about appellant's OSHA complaint until well after it was filed. Appellee contends that appellant's employment was terminated solely due to his failure to perform his job in accordance with the rules set forth in the employee

handbook.

Appellant filed a complaint asserting that he was discharged for filing OSHA complaints, but the complaint was dismissed by OSHA after he failed to appear at his unemployment hearing.

Appellant has timely appealed the trial court's decision granting summary judgment in favor of appellee and sets forth the following assignments of error:

> "1. The trial court erred in holding that plaintiff was not protected by R.C. §4113.52 and in dismissing plaintiff's whistleblower claim thereunder because the record demonstrates that plaintiff filed a written report with a regulatory agency, and that filing is protected from retaliation by R.C. §4113.52(C).
>
> "2. The trial court erred in dismissing plaintiff's whistleblower claim under R.C. §4113.52© for failure to file a written report with the employer where the statute (R.C. §4113.52(A)(2)) dispenses with any notice to the employer for complaints regarding R.C. Chapters 3704 and 3734.
>
> "3. The trial court erred in dismissing plaintiff's infliction of emotional distress claim as a matter of law.
>
> "4. The trial court erred in dismissing the plaintiff's claim under *Greeley v. Miami Valley Maintenance Contractors, Inc.* 49 Ohio St.3d 288 (1990)." (Emphasis *sic.*)

In the first assignment of error, appellant asserts that the trial court erred in holding that he was not protected by the whistle-blower statute, as set forth in R.C. 4113.52. Specifically, appellant argues that the statute does not require that he file a written report with his employer in order to invoke the protection from the statute.

It is well established that summary judgment can only be granted when the following factors have been established:

> "'*** (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor.'" *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 146, quoting *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66.

Additionally, the Supreme Court of Ohio has held:

> "A motion for summary judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial. (*Celotex v. Catrett* [1986], 477 U.S. 317, approved and followed.)" *Wing v. Anchor Media, Ltd. Of Texas* (1991), 59 Ohio St.3d 108, paragraph three of the syllabus.

R.C. 4113.(A(1)(a) provides:

> "If an employee becomes aware in the course of his employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that his employer has authority to correct, and the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, the employee orally shall notify his supervisor or other responsible officer of his employer of the violation and *subsequently shall*

file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. ***" (Emphasis added.)

The statute further prohibits retaliatory action by an employer against an employee who files a report pursuant to R.C. 4113.52(A(1). R.C. 4113.552(B).

The statute uses the mandatory term "shall" when referring to the oral notice and written notice that are to be given to the employer. Therefore, both oral and written notice to the employer are required. In *Bear v. Geetronics*, Inc. (1992), 83 Ohio App.3d 163, the court adopted this interpretation, stating:

> "As the express language of R.C. 4113.52(A)(1)(a) makes clear, in order for an employee to invoke the protection offered by the statute, the employee is required to both orally notify a supervisor or other responsible officer of the employer of the violation and file a written report with that supervisor or officer which provides sufficient detail to identify and describe the violation. The necessity that the employee fulfill both requirements is obvious. Oral notification is needed to establish a direct, personal contact between an official in a position of responsibility with the employer and the employee who is aware of the violation. The written report, on the other hand, is required to show that notice of the violation was given and, equally as important, to provide the employer with the specific facts surrounding the infraction so that the employer may formulate and implement the necessary corrective measures. The failure on the employee's part to satisfy either one of these two requirements, but in particular the written notice, hampers an employer's ability to quickly and effectively rectify the situation." *Id.* At 167.

The statute plainly requires both oral and written notification, and appellant is unable to direct this court's attention to any case that states otherwise. Accordingly, the trial court did not err in holding that appellant was not protected by the whistle-blower statute since appellant failed to give written notice to his employer.

Appellant's first assignment of error is without merit.

In the second assignment of error, appellant maintains that the trial court erred in dismissing his whistle-blower claim because R.C. 4113.52(A)(2) dispenses with any notice to the employer when the complaint involves R.C. Chapters 3704 and 3734.

R.C. 4113.52(A)(2) provides:

> "If an employee becomes aware in the course of his employment of a violation of Chapter 3704., 3734., 6109., or 6111. Of the Revised Code that is a criminal offense, the employee directly may notify, either orally or in writing, any appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which he is engaged."

A review of the record, however, reveals that appellant never argued this theory in the trial court. It is well established that an appellant may not assert a new theory for the first time before the appellate court. *Kalish v. Trans World Airlines* (1977), 50 Ohio St.2d 73; *Hoffecker v. Great Lakes Mall, Inc.* (Oct. 13, 1989), Lake App. No. 88-L-13-132, unreported. Accordingly, this court will not address appellant's argument that no notice to the employer is required for complaints regarding R.C. Chapters 3704 and 3734.

Appellant's second assignment of error is without merit.

In the third assignment of error, appellant contends that the trial court erred in dismissing his infliction of emotional distress claim. Specifically, appellant claims that there was sufficient evidence to support a finding against appellee for intentional infliction of emotional distress.

It is undisputed that while Ohio does not recognize a

separate tort for *negligent* infliction of emotional distress in the employment context, there is a separate and independent tort of *intentional* infliction of emotional distress.

In *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, the Supreme Court of Ohio adopted the following stringent standard for proving an intentional infliction of emotional distress:

> "The standard we adopt in our recognition of the tort of intentional infliction of serious emotional distress is succinctly spelled out in the Restatement as follows: 'One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.' Restatement of the Law 2d, Torts (1956) 71, Section 46(1).
>
> "***
>
> "With respect to the requirement that the conduct alleged be 'extreme and outrageous,' we find comment *d* to Section 46 of the Restatement, *supra*, at 73 to be instructive in describing this standard:
>
> "'*** It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally,

> the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"
>
> "'The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where some one's [*sic*] feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam. See Magruder, Mental and Emotional Disturbance in the Law of Torts, [49] Harvard Law Review 1033, 1053 (1936). ***'" *Id.* At 374-75.

In the instant cause, appellant claims that the conduct exhibited by appellee was nothing short of "extreme and outrageous." We disagree. Even if we construe the facts in favor of appellant as we are required to do in reviewing a summary judgment proceeding, the actions taken by appellee, while unpleasant to appellant, simply do not rise to the level of being "atrocious" and "utterly intolerable."

Assuming that co-workers were told not to associate with appellant and that his supervisors were instructed to keep notes on appellant's actions, these activities hardly qualify as being extreme or outrageous. Nor does the fact that appellee videotaped appellant while on the job constitute anything more than mere annoyance. Finally, even if a supervisor threatened to "punch the lights out" of appellant, there is no evidence that this was anything more than an

isolated incident by someone acting on his own rather than on behalf of appellee.

Further, and separate and apart from whether the conduct exhibited by appellee was "extreme and outrageous," we note that a plaintiff defending a motion for summary judgment on either negligent or intentional infliction of emotional distress must come forward with evidence of all elements of the claim or be dismissed. Failure to submit medical testimony or evidence of treatment for serious emotional distress defeats that element. *Hartwig v. National Broadcasting Co.* (1994), 863 F. Supp. 558.

Based upon the foregoing analysis, it is clear that appellant failed to sustain his burden with respect to his claim of intentional infliction of emotional distress. Therefore, the trial court properly dismissed this claim.

Appellant's third assignment of error is without merit.

In appellant's fourth assignment of error, he asserts that the trial court erred in dismissing his claim that his discharge was unlawful and in conflict with Ohio's public policy as established in *Greeley, supra.*

In *Greeley*, the court created a public policy exception to the employment-at-will doctrine when an employee is discharged or disciplined for a reason which is prohibited by statute. The Statute in question in *Greeley* was R.C. 3113.213(D) which prohibits an employer from using a court order that withholds an employee's wages for child support as a basis for discharging the employee.

Subsequently, in *Bear v. Geetronics, Inc., supra*, the Twelfth District Court of Appeals refused to create a public policy exception for whistle-blowing. The court held:

> "*** It is thus the express will of the General Assembly that actions similar to that instituted by appellant be brought pursuant to R.C. 4113.52. See *Ungrady v. Burns Internatl. Sec. Serv., Inc.* (N.D. Ohio 1991), 767 F.Supp. 849, 852. In light of the above, we believe R.C. 4113.52 preempts the formation of a public-policy exception to the employment-at-will doctrine within the specific

context of whistleblowing. ***" *Id.* at 169.

This court approved and followed *Bear in Murray v. Clinton Petroleum Co.* (July 9, 1993), Portage App. No. 92-P-0086, unreported. See, also, *Contreras v. Ferro Corp.* (Oct. 28, 1993), Cuyahoga App. Nos. 64394, 64424 and 64883, unreported. But, see, *Haynes v. Zoological Society of Cincinnati* (Dec. 22, 1993), Hamilton App. Nos. C-910598, C-910635, unreported, and *Clipson v. Schlessman* (1993), 89 Ohio App.3d 230.

Based upon the court's holding in *Bear, supra*, and our decision in *Murray, supra*, the trial court did not err in granting summary judgment on appellant's claim under *Greeley, supra*.

Appellant's fourth assignment of error is without merit.

For the reasons noted, judgment of the trial court is affirmed.

/s/_____
Judge Edwin T. Hofstetter,
Ret., Eleventh Appellate District,
Sitting by assignment.

FORD, P.J.,
CACIOPPO, J., Ret.,
Ninth Appellate District,
sitting by assignment,

concur.

APPENDIX K

COURT OF APPEALS NO. 93 G 1824

(Appeal from the Court of Common Pleas,
Geauga County, Ohio)
(Case No. 91 P 001049)

JAMES KULCH

Plaintiff-Appellant

vs.

STRUCTURAL FIBERS, INC.

Defendant-Appellee

BRIEF OF APPELLEES

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2. Whether the trial court properly granted Appellees' summary judgment on Appellant's Whistleblower claim under R.C. §4113.52(A)(1)(a) where Appellant did not file the requisite written report with Appellees and thus failed to satisfy the mandatory prerequisites to obtaining coverage under the Statute . . . . . [2]

3. Whether the trial court properly granted Appellees' summary judgment on Appellant's Whistleblower claim where Appellant's failure to file the written report with Appellees was not excused by R.C. §4113.51(A)(2) . . . . . [2]

4. Whether the trial court properly granted Appellees' summary judgment on Appellant's claim of negligent and intentional infliction of emotional distress where: . . . . . [2]

a. Ohio does not recognize negligent infliction of emotional distress claims in the employment context, and, in any event, it is undisputed that there is no evidence to support this claim, and;

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D. Counterstatement To Assignment Of Error No.2: Whether The Trial Court Properly Granted Appellees' Summary Judgment On Appellant's Whistleblower Claim Where Appellant's failure to

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Ohio does not recognize negligent infliction of emotional distress claims in the employment context, and, in any event, it is undisputed that there is no evidence to support this claim, and

The record is devoid of any evidence of either extreme and outrageous conduct on Appellees' part or that Appellant suffers from any serious debilitating emotional injury . . . . . [35]

1. The Trial Court Properly Dismissed Appellant's Negligent Infliction of Emotional Distress Claim Since Ohio Does Not Recognize This Claim In The Employment Context And Since There Exists No Evidence To Support Such A Claim . . . . . [35]

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b. There is No "Extreme And Outrageous" Conduct . . . . [40]

III. CONCLUSION . . . . . [41]

* * * * *

[24]

Appellant's sole basis for this claim is an alleged statutory violation of Ohio's Whistleblower statute, R.C. 4113.51, et seq.[18] The question of whether the Whistleblower statute is an exclusive remedy or whether a *Greeley* cause of action is simultaneously available has been considered by Ohio courts, including this one. The conclusion of this Court and four of the District Appellate Courts that considered it decided that the Whistleblower statute is an exclusive remedy.

This Court had before it the issue of whether the Whistleblower Act preempted a *Greeley* cause of action in Haynes v. Zoological Society of Cincinnati, (1995) 73 Ohio St.3d 254, 652 N.E. 2d 948, in which the First District Court of Appeals case in that decision was certified as in conflict with three other Districts (8th Dist.: Contreras v. Ferro Corporation, October 28, 1993) Cuyahoga App. Nos. 64394, 64424, and 64883 unreported, 1993 W.L. 437585; (TAB 31) 11th Dist.: Murray v. Clinton Petroleum Company (July 16, 1993) Portage App. No. 92-P-0086 unreported; (TAB 34) and Kulch v. Structural Fibers, (February 13, 1995) Geauga App. No. 93G1824 (unreported) (TAB 2) 12th Dist.: Bear v. Geetronics, Inc. (1992) 83 Ohio App. 3d 163, 614 N.E. 2d 803). This Court could not reach the issue because the Haynes was improperly certified.

Since that time, the Eight District added another decision and another District has joined in the opposition to the First District decision in *Haynes* (Rayel v. Wackenhut Corp. (June 8, 1995), Cuyahoga App. No. 67459, 1995 W.L. 350077; (TAB 36) 10th District in Cisneros v. Birck (April 11, 1995) Franklin App. No. 94 APP 08-1255, unreported, 1995 W.L. 222156

* * * * *

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[18] Although he now refers to 29 U.S.C. 660(c), OSHA Sec. 11(c), Appellant never did so before. See Plaintiff's Brief in Opposition to Defendants' Motion to dismiss, pp. 11-12 (T.d. 86).

Appellant's Public Report to OSHA is not a report about a criminal offense, but rather, about chemical uses. Reports of non-criminal safety hazards are not protected by the Whistleblower Act.[20] A "violation" in R.C. §4113.52(A)(1) is defined as follows:

> ... either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony. (Emphasis added.)

The legislative history clearly shows that the terms "physical harm to persons or hazard to public safety" were terms of art taken from the Ohio Criminal Code, Chapter 29. Legislative Service Commission, June 4, 1987 (TAB B8) and Committee Minutes June 9, 1987 (TAB B4).

The record also establishes that Appellant did not give Oral Notice about a felony or a criminal offense (as defined by the statute). Indeed, no Oral Notice was given with regard to the basis of any non-criminal OSHA complaint.[21] Ultimately, if a *prima facie* case could be made, the objective basis of the discharge (videotaped cheating) would be a total defense over which there is no genuine issue of material fact.

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[20] OSHA provides for criminal sanctions in only four situations:

1. Willful violations causing death. (Section 17(e))
2. Giving unauthorized advance notice. (Section 17(f))
3. Giving false information to the agency. (Section 17(g))
4. Killing, assaulting or hampering the work of a CSHO (Federal investigator). (Section 17(h)(2))

[21] Any sporadic vague gripes to various supervisors or co-employees Appellant may allege he made clearly do not satisfy the Oral Notice requirement since none were notifications of a violation of criminal portion of OSHA and were not made before January, 1991.

[29,30]

D. Counterstatement To Assignment Of Error No.2:

Whether The Trial Court Properly Granted Appellees' Summary Judgment On Appellant's failure to file the Written Report with Appellees was not excused under R.C. §4113.52(A)(2).

Absent the Written Report, the cases and legislative history require dismissal under R.C. §4113.52(A)(1). Appellants seek refuge in the specious argument that his claim is under R.C. §4113.52(A)(2) where the Written Report is not required. This is hedging to the point of hypocrisy. R.C. §4113.52(A)(2) does not apply here because (1) this legal theory was not raised below; (2) the statute and legislative history and cases are clear that only certain specific Ohio statutes are involved, not OSHA, (3) the specific statutes listed have only to do with environmental conditions that occur outside of building, not chemicals inside building; (4) plaintiff admits he went to no agency except OSHA.

It is axiomatic that an Appellant "may not assert a new legal theory for the first time before the appellate court." *Eagleye v. TRW, Inc., supra*, at p.5 citing *State Farm Mutual Auto Ins. Co. v. Latimore* (Nov. 5, 1992), Cuyahoga App. No. 63142 at 6, citing *Kalesh v. TransWorld Airlines, Inc.* (1977), 50 Ohio St.2d 73. Undisputed facts and the case law do not support Appellant's new theory either;[22] nor does the law.

The *Haynes* facts included OSHA complaints and neither the plaintiff nor the court analyzed the case under R.C. §4113.52(A)(2). Judge Nugent in *Contreras* explained R.C. §4113.52(A)(2):

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[22] Appellant admitted he did not go to any public agency other than OSHA. Deposition of James Kulch, Volume II, p.391, L.20, attached as TAB D.

> Finally, it is only in limited situation where an employee becomes aware of violations of environmental laws that an employee may provide notification directly to the appropriate authorities. R.C. §4113.52(A)(2).

Contreras, p.22.

Legislative history is contra-Appellant. The Senate version of the bill listed several circumstances where an employee would be justified in reporting violations directly to a public authority without necessity of first giving to the employer. However, the statute as enacted was ultimately limited to violations of four Chapters of the Revised Code.

The reasoning for the specific exception of (A)(2) to the strict requirements of (A)(1)(a) was based, in part, by lobbying from the Attorney General to include language that would materially assist in the prosecution of hazardous waste cases. *Gongwer News Service*, (TAB B7, pg.2). The Attorney General's office observed that half the cases initiated by the state involving violations of hazardous waste laws resulted from leads provided by employees of hazardous waste disposal firms. *Id.* The Attorney General urged that for environmental crimes, an employee should be assured of statutory safeguards if an employee reports a suspected violation directly to someone with authority to correct the violation (TAB B9).[23]

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[23] Memorandum written by Julianna F. Bull, Assistant Attorney General to Representative Dwight Wise dated January 13, 1988 which contained recommended language stating : "If the violation is one which represents a hazard to public health and safety, or is a violation of R.C. Chapter 3704, 3734, or 6111, the employee may directly notify, orally or in writing, the appropriate authority, with ability to correct the suspected violations." The language which was finally adopted left out references to any violations which present a hazard to public health or safety. This omission indicates that exceptions to the strict modification and reporting

The statutes listed in R.C. §4113.52(A)(2) do not support Appellant (*i.e.*, O.R.C. Chapter 3704, 3734, 6109 and 6111). Appellant's OSHA complaint states "Employees are complaining of bloody noses, lung problems, and allergies from chemicals in the air," and that the location is "winding area of main plant." None of the Ohio Revised Code Chapters cited in R.C. §4113.52(A)(2) applies to the hazard description and its location as stated in Appellant's OSHA complaint.

The condition about which Appellant complained was not a violation of Chapter 3734, Solid and Hazardous Wastes. "Solid wastes," are defined as "unwanted residual solid or semisolid materials as results from industrial . . . operations . . . [and] does not include any material that is . . . a hazardous waste." Appellant's description of the hazard was that there were "chemicals in the air." In the absence of an indication that a third party was hurling chunks of chemicals at Appellant, this description comports with the chemicals being neither "solid" nor "semi-solid", but gaseous so as to be "in the air."

If a material is to regulated by Chapter 3734 and is not a "solid waste," then it must be a "hazardous waste"[24] defined as ". . . any waste or combination of wastes in solid . . . or contained gaseous form . . . ." Appellant's complaint indicates that the complained-of chemicals demonstrated in the previous paragraph to have been in gaseous form. However, the gas was not contained, but "in the air." They are not contained "wastes" are so are not regulated by Chapter 3734.

The condition about which Appellant complained was not a criminal offense violation of air regulations Chapter 3704.

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requirements were to be strictly construed and to only apply to those violations of the enumerated in the specified Revised Code Chapters. *See, also, Gongwer News Service* (TAB B7, p.2).

[24] For purposes of completeness, "infectious wastes" are also regulated by this chapter. However, Appellees are probably entitled to judicial notice that the stuff of OSHA complaint is not "infectious waste."

Criminal penalties for violations of the various sections of Chapter 3704 are contained in R.C. §3704.99(A) through (E) and refer back to the various other sections.

R.C.§3704.99(A)(B): Violations of R.C.§3704.05(A) through (I) (emission of air contaminants);

R.C.§3704.99(C): a violation of R.C. §3704.15 or division (B)(1) or (2) or (C)(1) or (2) or R.C. §§3704.17 (selling fluorocarbcontaininging aerosol cans and violations of motor vehicle inspection stations):

R.C.§3704.99(D)-(F): a violation of division (B)(2) or division (C)(1) of R.C. §3704.16 (tampering with an emissions control system on a motor vehicle).

Violations under R.C. §3704(C) -(E) do not apply. The other criminal penalties are R.C. §3704.99(A) and (B) which both refer to parts of R.C. §3704.05(A) - (I)[25] relating to "emission" of "air contaminants" into the outside air. Appellant's complaint about chemicals in the air in the "winding area of the main plant," is not a complaint about air pollution in the air outside the plant within the meaning of Chapter 3704.

Chapter 3704 deals with outside air. The section that sets out the purposes of Chapter 3704 states:

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[25] R.C. §3704.05(I) deals with R.C. §3704.14 (motor vehicle emission systems) and Chapter 4503 (motor vehicles in general) and does not apply.

> "To enable the state, through the director of environmental protection, to adopt and maintain a program for the prevention, control, and abatement of air pollution . . . ."

Additionally, the powers and duties of the director of environmental protection may include the development of " . . . programs for the prevention, control, and abatement of air pollution" ways to permit, monitor and prevent it in one manifestation or the other R.C. §37014.03(A). The type of "air pollution" Chapter 3704 deals with is "outside the building." Air pollution is " . . . the presence in the ambient air of one or more air contaminants . . . ." R.C. §3704.01(D) "Ambient air", in turn, is defined in R.C. §3704.01(E) as "that portion of the atmosphere outside of buildings and other enclosures, stacks, or ducts that surround human, plant, or animal life, or property."

Divisions (A) and (B) of R.C. §3704.05 address "emissions," which is defined in R.C. §3704.01(F) as "the release into the ambient air of an air contaminant." Division © addresses actions in R.C. §3704.03(G) and (F) concerning "any air contaminant source" or any gadget intended to control "emission of air contaminants." Division (D) is also concerned with " . . . person responsible for any air contaminant source . . ." Division (E) addresses conduct of persons holding a permit under R.C. §3704.03(G), which relates to variances for "air contaminant sources." Division (F) relates to plans and specifications concerned with air contaminant sources or with emissions. **As previously demonstrated "emissions," involve release into the "ambient air," and "ambient air" is "the atmosphere outside of buildings."**

R.C. §3704.05(G) and it relates to administration of the Act (*i.e.*, Chapter 3704). Appellant's OSHA complaint does not involve a violation of any rule, order or determination the director could make pursuant to Chapter 3704 as is obvious from the definitions used above to interpret the applicability of (A) through (F) of R.C. §3404.05.

Division (H), (J), and (K) also refer to Title V to the 1990 federal Clean Air Act Amendments (CAAA) as implemented in Ohio by the Ohio Environmental Protection Agency. As shown above, neither the location of the "chemicals in the air" nor their amounts bring the complained of conditions into the prohibited acts of these sections.

The CAAA were promulgated in response to industrial air pollution, acid rain, ozone and atmospheric haze, gasoline powered vehicle emissions and the like. Congress' Declaration of Purpose in 42 USC §7401 indicates the old Clean Air Acts of 1970 and 1977 needed beefing up to mitigate the "mounting dangers to the public health and welfare." The CAAA is, as is Title 37 of the Ohio Revised Code, concerned with emissions into the air outside of factories and outside of cars that can lead to public health problems. The CAAA intended that the federal Clean Air Act be administered by the various states. Ohio's Title V permit program is described in R.C. §3704.036. Facilities that require permits under Title V are major source facilities and affected source facilities[26] as defined in 40 CFR §70.2 and solid waste incineration units[27], and any other sources the administrator wants to include in the program. For purposes of Title V, a "facility" means all of "the emitting activities that are under control of the same person . . . ." R.C. §3704.01(H) indicates "emit" or "emission" which means the release into the "ambient air" which is, of course, that "portion of the atmosphere outside the building." The area Appellant complained of, the winding area of the main plant, does not describe a "facility" and the chemicals were not alleged to be outside the building, but inside.

---

[26] "Affected Sources" are regulated under the "Acid Rain" provisions of the Clean Air Act. That "chemicals in the air" in the "main plant" do not contribute to acid rain is self-evident.

[27] It has been demonstrated elsewhere that "chemicals in the air" do not fit the definition of "solid waste." Additionally, there was no incineration involved.

Neither is the winding operation taking place in the winding area of the main plant a "source" within the meaning of either Chapter 3704 or Title V permit program (R.C.§3704.036) permit because 40 CFR §70.2 defines a "major source" as emitting or having the potential to emit at least tons per year hazardous air pollutants (HAPS) of volatile organic chemicals. OSHA's own data taken at the winders on 4/9/91 and reported on Ex. 15 shows maximum detected levels of acetone as about 6.5 parts per million (ppm) and styrene at 1.3 ppm, nowhere near the pounds per day emission needed to add up to 10 tons a year to cause the winding area to be a "source" even if the activity were carried on outside the building.

The condition complained of in the OSHA complaint took place in the air inside "winding area of main plant." The winding area was not located in the atmosphere outside of the main plant. Hence, no violations of R.C. §§3704.05(A) through (K) occurred and no criminal offense violations could have taken place.

E. Counterstatement To Assignment Of Error No.3:

Whether the trial court properly granted Appellees' summary judgment on Appellant's negligent and intentional infliction of emotional distress claims where:

Ohio does not recognize negligent infliction of emotional distress claims in the employment context, and, in any event, it is undisputed that there is no evidence to support this claim, and

The record is devoid of any evidence of either extreme and outrageous conduct on Appellees' part or that Appellant suffers from any serious debilitating emotional injury.

The trial court properly dismissed Appellant's negligent and intentional infliction of emotional distress claims.

1. The Trial Court Properly Dismissed Appellant's Negligent Infliction of Emotional Distress Claim Since Ohio Does Not Recognize This Claim In The Employment Context And Since There Exists No Evidence To Support Such A Claim.

Appellant spends the first two pages under Assignment of Error No.3 refuting an argument which was never an issue before the trial court. Appellee did not argue nor did the trial court base its decision on the argument that Ohio does not recognize claims for emotional distress in the employment context or that such claims are preempted by existing statutory remedies. Instead, Appellee pointed out to the trial court the established law in Ohio that

* * * * *

APPENDIX L

IN THE COURT OF APPEALS
FOR THE ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

C.A. NO. 93 G 1824

Trial Court
Case No. 91 P 001049

JAMES KULCH

Plaintiff-Appellant

vs.

STRUCTURAL FIBERS, INC.

Defendant-Appellee

BRIEF OF APPELLANT

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Assignment of Error No. 1:

> The trial court erred in holding that plaintiff was not protected by R.C. §4113.52 and in dismissing plaintiff's whistleblower claim thereunder because the record demonstrates that plaintiff filed a written report with a regulatory agency, and that filing is protected from retaliation by R.C. §4113.52(C) . . . [6]

Assignment of Error No. 2:

> The trial court erred in dismissing plaintiff's whistleblower claim under R.C. §4113.52(C) for failure to file a written report with the employer where the statute (R.C. §4113.52(A(2)) dispenses with any notice to the employer for complaints regarding R.C. Chapters 3704 and 3734 . . . . . [10]

Assignment of Error No. 3:

> The trial court erred in dismissing plaintiff's infliction of emotional distress claim as a matter of law . . . . . [12]

A. The existing common law tort of infliction of emotional distress is available as a separate claim in a whistleblower suit under R.C. §4113.52 . . . . . [12]

B. Since the whistleblower statute is remedial and required to be liberally construed, where it contains no preemption language, a preemption of existing independent common law tort remedies will not be implied . . . . . [16]

C. Areasonablee juror could find a tort of infliction of emotional distress to be established by defendant's conduct in this case . . . . . [18]

Assignment of Error No. 4:

The trial court erred in dismissing the plaintiff's claim under Greeley v. Miami Valley Maintenance Contractors, Inc., 49 Ohio St.3d 228 (1990) . . . . . [20]

A. The cases followed by the trial court were based on invented, false material . . . . . [20]

B. The Rheinecker Court relied on a false statement of the Whistleblower Act's "legislative history" . . . . . [21]

C. Greeley claims are not preempted in whistleblower cases under R.C. §4113.52 . . . . . [26]

CONCLUSION . . . . . [30]

CERTIFICATE OF SERVICE . . . . . [32]

APPENDIX . . . . . [33]

Exhibits "A" through "L" (summary judgment attachments)

Exhibit "1" (April 27, 1992, Memorandum and Order of Aldrich, J.)

Affidavits of Dwight Wise, Jr., Dennis E. Murray, Sr., Karla M. Hall, Charles Arp

Copies of Unreported Opinions

APPENDIX M

IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

FILED
Nov 10, 1993
Betty Montague
Clerk of Courts, Geauga County

Case No. 91 P 001049
Judge Hans R. Veit

JAMES KULCH, *Plaintiff*,	)	
v.	)	**JUDGMENT ENTRY**
STRUCTURAL FIBERS, INC., et al. *Defendants*.	)	

This case is before the court on defendants' motion for judgment on the pleadings and for summary judgment.

Plaintiff seeks to recover damages for wrongful discharge pursuant to the Whistleblower Act, R.C. 4113.52. Plaintiff reported to the Occupational Safety and Health Administration (OSHA) that the defendant's work place was unsafe because defendant permitted the use and discharge into the air of toxic and corrosive chemicals. Defendant claims that plaintiff was discharged, not for whistleblowing, but for unsatisfactory work performance. For the purposes of this motion, the court must

assume that defendant discharged plaintiff because plaintiff reported defendant to OSHA.

In addition to a violation of the Whistleblowers Act, plaintiff alleges that his discharge was unlawful and in conflict with Ohio's public policy as established in Greeley v. Miami Valley Maintenance Contractors, Inc. (1990), 49 Ohio St. 3d 228. First, the court is of the opinion that the Whistleblower Act in Ohio has preempted this field so that a public policy exception to the employment at will doctrine does not exist in Ohio for whistleblowing. Bear v. Geetronics, Inc. (1992), 83 Ohio App. 3d 163. See also, Murray v. Vinton Petroleum Company (1993), C.A. Portage County #92 P 0086, Unreported.

As to the violations of the Whistleblower Statute, R.C. 4113.52 specifically provides that an employee must first give oral and written notice to the employer in order to be protected by the statute. It is undisputed in this case that plaintiff orally complained to the employer about the unsafe or unhealthy condition in the plant, but that he never made a written complaint to the employer.

In the Bear case, supra, the court stated the purpose of written notice as follows at page 167:

> "Oral notification is needed to establish a direct, personal contact between an official in a position of responsibility with the employer and the employee who is aware of the violation. The written report, on the other hand, is required to show that notice of the violation was given and, equally as important, to provide the employer with the specific facts surrounding the infraction so that the employer may formulate and implement the necessary corrective measures. The failure on the employee's part to satisfy either one of these two requirements, but in particular the written notice, hampers an employer's ability to quickly and effectively rectify the situation."

Accordingly, the court holds that plaintiff is not afforded protection pursuant R.C. 4113.52 and that no genuine issue exists

as to any material fact and that judgment should be granted as a matter of law with respect to the claimed violation of statute.

Next, plaintiff contends that he was fired in contravention to defendant's own policy as expressed in the company handbook requiring a warning before discharge. The court has examined the company handbook and concludes that a genuine issue of fact may well exist as to whether the whistleblowing and improper work performance warrant discharge (See Deft. Ex. 48). However, the handbook specifically states at page one that the handbook does not constitute a contract of employment. Accordingly, summary judgment must be granted on this cause of action as well.

Finally, plaintiff claims that he suffered emotion distress because of defendant's intentional and negligent actions. Construing the facts most favorably for the plaintiff, the court concludes that defendant's conduct was neither extreme nor outrageous.

Accordingly, the court grants defendant's motion for summary judgment and finds for defendant on the complaint.

Judgment is entered accordingly and the costs are assessed against the plaintiff.

/s/_____
Hans R. Veit, Judge

cc: Patrick J. Perotti, Esq.
Gregory P. Szuter, Esq.

APPENDIX N

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
April 7, 1992
Clerk

Case No. 1:92CV0235

JAMES KULCH, *Plaintiff*,	)	
v.	)	**MEMORANDUM AND ORDER**
STRUCTURAL FIBERS, INC., *Defendant*.	)	

ALDRICH, J.

This action was brought by James Kulch against his employer, Structural Fibers, Inc ("SFI"). Kulch alleges that he reported to SFI what he perceived to be dangerous conditions in his workplace and then, after receiving an inadequate response, to the Occupational Safety and Health Administration ("OSHA").

After an investigation, OSHA assessed SFI a substantial fine. Kulch then alleges that soon thereafter, SFI began to discriminate against him and eventually fired him without cause. Kulch then pleads six causes of action, claiming liability of SFI for:

1) a violation of the Ohio Whistleblower statute, Ohio Rev. §4113.52; 2) a violation of Ohio common law proscriptions against retaliatory discharge; 3) infliction of emotional distress; 4) negligence; 5) recklessness; and 6) equitable reinstatement.

Kulch initially filed his complaint in the Geauga County Court of Common Pleas. SFI then removed the case to this Court based on 28 U.S.C. §1441, which provides for removal to this Court of cases involving federal questions. SFI states that Kulch's third cause of action raises a federal question because it is preempted by 29 U.S.C. §§1001 et seq. ("ERISA"). In response, Kulch has moved for remand, arguing that his third cause of action is not preempted by ERISA. Kulch's third cause of action states:

> 22. The source of plaintiff's income for his family has been the wages from his employment with defendant.
>
> 23. As a direct and proximate result of defendant's wrongful and discriminatory actions, plaintiff's source of income has been cut off and plaintiff has been unable to pay his bills as they come due and has been unable to pay his ordinary and everyday living expenses.
>
> 24. Defendant was specifically aware that Mr. Kulch has a significant heart condition, and that during his employment he has experienced heart problems.
>
> 25. Despite this, defendant completely terminated Mr. Kulch's medical insurance and benefits when they wrongfully fired him, and he has now been unable to pay for his medical care for his heart condition.
>
> 26. As a direct and proximate result of the foregoing wrongful actions by defendant, plaintiff has been damaged and injured and has incurred

> and continues to incur extreme and ongoing pain and suffering; plaintiff has experienced and continues to experience extremely severe and ongoing emotional distress, nervousness, anxiety, nausea, and anguish all to his damage.

It is true that "the Supreme Court has given ERISA a broad construction with respect to its preemptive effect on state law and state actions that 'relate to' an employee benefit Plan." Perry v. P*I*E Nationwide, Inc., 872 F.2d 157, 160 (6th Cir. 1989). However, a mere mention in the complaint that Kulch's discharge resulted in termination of medical benefits does not mean that his claim "relates to" an employee benefit plan. "ERISA preempts only those state law claims that arise out of the administration of a plan." Etheridge v. Harbor House Restaurant, 861 F.2d 1389, 1404 (9th Cir. 1988) (emphasis added). "No ERISA cause of action lies ... when the loss of [plan] benefits was a mere consequence of, but not a motivating factor behind, the termination of benefits." Id. at 1405 (citation omitted). See also Yageman v. Vista Maria Sisters of the Good Shepherd, 767 F. Supp. 144, 145 (E.D. Mich. 1991); Tippett v. Old Kent Bank of Petoskey, 134 F.R.D. 159, 161 (W.D. Mich 1991).

Here, Kulch merely alleges in his third cause of action that: 1) as a result of his termination he was deprived of medical benefits; and 2) SFI knew the extent of distress this deprivation would cause since SFI knew of Kulch's physical condition. Kulch alleges only that the loss of his benefits was a consequence of his termination, not that SFI's termination of his employment was motivated by a wish to deprive him of benefits.

In sum, Kulch's third cause of action is not preempted by ERISA, and Kulch states no claim under federal law. Accordingly, Kulch's motion to remand this case to the Geauga County Court of Common Pleas, pursuant to 28 U.S.C. §1447, is hereby granted.

IT IS SO ORDERED.

/s/_____
ANN ALDRICH
UNITED STATES DISTRICT JUDGE

APPENDIX O

WILLIAMS, Plaintiffs-Appellants,
and
FIREMAN'S FUND INSURANCE COMPANY,

v.

J.I. CASE COMPANY, Defendants-Appellees,
and
Harlo Corporation South State Contractors, Inc., Third Party Defendants.

No. 91-5706.

United States Court of Appeals, Sixth Circuit

May 22, 1992

On Appeal from the United States District Court for the Eastern District of Kentucky, 89-00482, Forester, J.
E.D. Ky.
AFFIRMED

Unpublished Disposition
(Cite as: 963 F.2d 374, 1992 WL 111809 (6th Cir. (Ky.)))

NOTICE: Sixth Circuit Rule 24(c) states that citation of unpublished dispositions is disfavored except for establishing res judicata, estoppel, or the law of the case and requires service of copies of

cited unpublished dispositions of the Sixth Circuit.

Before MILBURN and SUHRHEINRICH, Circuit Judges and COHN [FN*] District Judge.

FN* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

PER CURIAM.

**1 While performing work for his employer South State Contractors, Inc. ("South State"), Mickey Williams fell from a work basket held aloft by a forklift manufactured by defendants J.I. Case Company ("Case") and Harlo Corporation ("Harlo"). After recovering worker's compensation, Williams and South State's insurance carrier, Fireman's Fund, brought this action against Case and Harlo alleging negligence, strict liability, breach of express and implied warranties, and failure to warn. The defendants filed a third party complaint against South State. The breach of warranty claims were dismissed on summary judgment prior to trial. After a bifurcated trial as to liability only, the jury returned a verdict in favor of Case and Harlo, finding that the accident was caused by the negligence of Williams and South State. [FN1] For the reasons that follow, we affirm.

FN1. Under Kentucky law, Williams's exclusive remedy against South State was worker's compensation. Ky.Rev.Stat.Ann. s 342.680.

I

Mickey Williams was employed by South State to hang sheet metal siding on an airplane hanger being constructed in Lexington, Kentucky. To allow Williams to reach the upper portions of the hangar, South State attached a work basket to the forks of a forklift it had purchased from Case. While working at an elevation of approximately twenty-eight feet, the basket in which Williams and a co-worker were standing detached from the forklift. Williams sustained substantial injuries in the fall.

The mechanism that raised, lowered and supported the forks was manufactured and supplied to Case by Harlo. The design called for the forks to be held in place by roll pins that could be removed to facilitate transportation of the forklift. The roll pin supporting the fork to which Williams's work basket was attached had been removed and was not replaced. The absence of the roll pin caused Williams's basket to detach.

II

Case and Harlo defended on the grounds that the failure of South State to replace the roll pins was the proximate cause of William's injuries. During the course of the trial, the defendants introduced testimony concerning the requirements of the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. s 651 et seq., the Kentucky Occupational Safety and Health Act ("KOSHA"), Ky.Rev.Stat.Ann. Ch. 338, and the compliance of Williams's employer, South State, with those requirements. In addition, the district court instructed the jury that South State had a duty to exercise ordinary care to furnish Williams with a safe workplace and safe work equipment and that this duty included complying with various KOSHA regulations. The jury found that South State had violated its duty to Williams but that neither defendant violated its duty to Williams. Williams objected to both the testimony and the jury instruction. The federal government and the Commonwealth of Kentucky have respectively adopted OSHA and KOSHA legislation to protect worker safety. With respect to this case, the relevant provisions of each statute, and the regulations promulgated under it, are identical. [FN3] Each provides:

> FN3. Judge Forester specifically ruled that it was evidence regarding KOSHA, rather than OSHA, that was to be admitted. Although some of the witnesses used the term OSHA rather than KOSHA when discussing the regulations at issue or South State's compliance, the fact that the provisions of

> these regulations are identical renders such semantic slips harmless.

**2 Nothing in this chapter shall be construed to supersede or in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of, employment.
29 U.S.C. s 653 (b)(4); Ky.Rev.Stat.Ann. s 338.021(2).

Williams urges that this provision prohibits the admission of OSHA or KOSHA regulations, or noncompliance therewith, as evidence of an employer's standard of care or as establishing negligence per se. The Kentucky courts have interpreted section 338.021(2) as meaning only that KOSHA does not establish an independent cause of action; it does not preclude the use of KOSHA regulations as a basis of liability in a cause of action established in another statute or at common law. Kentucky Utils. Co. v. Auto Crane Co., 674 S.W.2d 15, 17 (Ky.App.1983); Barmet of Kentucky, Inc. v. Sallee, 605 S.W.2d 29 (Ky.App.1980); Childers v. International Harvester Co., 569 S.W.2d 675, 677 (Ky.App.1977). Kentucky law is clear that, where applicable, KOSHA regulations may establish the relevant standard of care.

Williams argues to the contrary that Kentucky law is unsettled and cites Stinnett v. Buchele, 598 S.W.2d 469 (Ky.App.1980). This reliance is misplaced. Stinnett held only that the cause of action itself may not be derived from KOSHA and, therefore, does not contradict the principle that KOSHA may be used to establish the standard of care under an existing cause of action. See id. At 471-72. Several federal circuit courts are in accord with this position. See Rabon v. Automatic Fasteners, Inc., 672 F.2d 1231, 1238 (5th Cir. Unit B 1982); Pratico v. Portland Terminal Co., 783 F.2d 255, 264-66 (1st Cir. 1985); Donovan v. General Motors, 762 F.2d 701, 705-06 (8th Cir. 1985).

Williams next argues that even if Kentucky law would impose the KOSHA regulations as South State's standard of care, Kentucky law is preempted by OSHA. In the Sixth Circuit, his argument continues, OSHA s 653 (B)(4) bars the admission of OSHA regulations as evidence of the standard of care. Assuming that Williams's construction of Sixth Circuit precedent is correct, [FN4] the preemption argument fails. The decision of the Kentucky courts to allow KOSHA to establish the standard of care is a matter of state **tort** law. It is well-established that OSHA does not preempt state **tort** law. See Pedraza v. Shell Oil Co., 942 F.2d 48, 53 (1st Cir.1991); National Solid Wastes Management Ass'n v. Killian, 918 F.2d 671, 680 n. 9 (7th Cir.1990).

> FN4. Williams's position finds support in Minichello v. U.S. Indus., Inc., 756 F.2d 26 (6th Cir.1985). Although the precise holding of the case is that OSHA cannot be used to establish whether a product is unreasonably dangerous, this holding was derived from the court's broad interpretation of section 653(b)(4). The court read section 653(b)(4) as prohibiting the use of OSHA regulations to "alter the civil standard of liability." Id. at 29. Another panel of this court has indicated, in dicta, that "compliance with [safety] codes and standards may be probative of a manufacturer's standard of care." Bailey v. V & O Press. Co., 770 F.2d 601, 609 n. 5 (6th Cir.1985) (discussing OSHA). Given the state of Kentucky law, we need not resolve this conflict.

III

On Williams's strict liability claim, the district court instructed the jury that:

> J.I. Case Company and Harlo Corporation are liable only for the injuries, if any, that would have

> occurred if the forklift had been used in its original, unaltered and unmodified condition. For purposes of this instruction, product alteration or modification includes the failure to observe routine care and maintenance.

**3 This instruction follows the language of the Kentucky Products Liability Act, Ky.Rev.Stat.Ann. s 411.320(1). [FN5]

> FN5. This statute provides:
> In any product liability action, a manufacturer shall be liable only for the personal injury, death or property damage that would have occurred if the product had been used in its original, unaltered and unmodified condition. For the purpose of this section, product alteration or modification shall include failure to observe routine care and maintenance, but shall not include ordinary wear and tear. This section shall apply to alterations or modifications made by any person or entity except those made in accordance with specifications or instructions furnished by the manufacturer.
> Id.

The question before us is whether a reasonable person could have found the removal of the roll pin to be an alteration or modification within the meaning of the products liability statute and therefore it was error to give the instruction. We have held that removing a machine part is an alteration or modification of the product. See Hutt v. Gibson Fiber Glass Prods., Inc. 914 F.2d 790, 794 (6th Cir.1990) (removal of grounding wire from boat constitutes an alteration or modification). Williams attempts to distinguish Hutt on general tort law principles; specifically, that the removal there was not foreseeable. However, this circuit has refused "to read the common law concept of foreseeability ... into the Product Liability Act." Hines v. Joy Mfg. Co., 850 F.2d 1146,

1151 (6th Cir.1988) (refusing to import Restatement (Second) of **Torts** s 402A into the Kentucky Products Liability Act). Therefore, the jury was entitled to find the removal of the roll pin to be an alteration or modification.

During oral argument, the panel inquired extensively into the jury instructions. Williams now assails the charge for failing to expressly instruct the jury that it might regard even an altered or modified product as defectively designed. Such an instruction would be contrary to Kentucky law. Relevant Kentucky authority has been unstintingly interpreted to prohibit such a recovery. See, e.g., Hines, 850 F.2d at 1151. Williams enlists Wheeler v. Andrew Jergens Co., 697 S.W.2d 326 (Ky.App.1985), in his attempt to inject indeterminacy into this otherwise orderly area of law. Wheeler, however, offers no comfort. There, the plaintiff suffered substantial hair loss after using shampoo manufactured by the defendant. The trial court directed a defense verdict on the grounds that a third party had tampered with the shampoo. The Kentucky Court of Appeals reversed, holding, inter alia, that even if the shampoo was modified the jury was entitled to consider the plaintiff's claim that the bottle was defectively designed. Id. at 328. There was no indication that the bottle had been altered or modified, so section 411.320(1) did not apply.

Here, on the other hand, the alterations or modifications were made on precisely the machine, viz. the forklift, that Williams claims was defectively designed. The strict provisions of section 411.320(1) proscribe the imposition of liability on such facts.

Moreover, it does not appear that Williams preserved this argument. Although he objected generally to the instruction regarding alteration, he did not specifically request an instruction that alteration does not preclude recovery for defective design. The suggestion that this instruction be given was not made until oral argument, which precludes Williams from pursuing this claim on appeal. See Wiskotoni v. Michigan Nat'l Bank-West, 716 F.2d 378, 382 (6th Cir.1983).

IV

**4 Williams also challenges the district court's refusal to allow him to amend his complaint to seek punitive damages and its apportionment instruction. Since we have affirmed in all respects the finding that neither defendant was liable, we need not address these challenges.

Affirmed.

COHN, District Judge

I dissent. As I read Kentucky law, and particularly Wheeler v. Andrew Jergens Co., 696 S.W.2d 326 (Ky.App.1985), if the alteration or modification of a product is foreseeable by the manufacturer then the product may, under certain circumstances, be viewed as defectively designed. In distinguishing the facts in Jergens from the facts at issue here, the majority simply elevates form above substance. Moreover, Williams presented evidence implication the Jergens rule to the jury and requested such a jury instruction. Because the lawyers could not agree on the jury instruction, the trial court went forward with its own instruction. Williams agin made some effort to obtain a Jergens instruction. Because the record, as I view it, clearly entitled him to such an instruction and because of the confusion attendant upon preparation and delivery of the instruction, I am of the opinion Williams is entitled to a new trial.

APPENDIX P

RELEVANT STATUTES

OHIO WHISTLEBLOWER STATUTE
OHIO REVISED CODE

4113.52 Employees to report violations of state or federal law; retaliatory conduct prohibited

(A)(1)(a) If an employee becomes aware in the course of his employment of a violation of any state or federal statute or any ordinance or regulation of a political subdivision that his employer has authority to correct, and the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, the employee orally shall notify his supervisor or other responsible officer to his employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation. If the employer does not correct the violation or make a reasonable and good faith effort to correct the violation within twenty-four hours after the oral notification or the receipt of the report, whichever is earlier, the employee may file a written report that provides sufficient detail to identify and describe the violation with the prosecuting authority of the county or municipal corporation where the violation occurred, with a peace officer, with the inspector general if the violation is within his jurisdiction, or with any other appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which he is engaged.

(b) If an employee makes a report under division (A)(1)(a)

of this section, the employer, within twenty-four hours after the oral notification was made or the report was received or by the close of business on the next regular business day following the day on which the oral notification was made or the report was received, whichever is later, shall notify the employee, in writing, of any effort of the employer to correct the alleged violation or hazard or of the absence of the alleged violation or hazard.

(2) If an employee becomes aware in the course of his employment of a violation of Chapter 3704., 3734., 6109., or 6111. of the Revised Code that is a criminal offense, the employee directly may notify, either orally or in writing, any appropriate public official or agency that has regulatory authority over the employer and the industry, trade, or business in which he is engaged.

(3) If an employee becomes aware in the course of his employment of a violation by a fellow employee of any state or federal statute nay ordinance or regulation of a political subdivisions, or any work rule or company policy of his employer and the employee reasonably believes that the violation either is a criminal offense that is likely to cause an imminent risk of physical harm to persons or a hazard to public health or safety or is a felony, the employee orally shall notify his supervisor or other responsible officer of his employer of the violation and subsequently shall file with that supervisor or officer a written report that provides sufficient detail to identify and describe the violation.

(B) Except as otherwise provided in division (C) of this section, no employer shall take any disciplinary or retaliatory action against an employee for making any report authorized by division (A)(1) or (2) of this section, or as a result of the employee's having made any inquiry or taken any other action to ensure the accuracy of any information reported under either such division. No employer shall take any disciplinary or retaliatory action against an employee for making any report authorized by division (A)(3) of this section if the employee made a reasonable and good faith effort to determine the accuracy of any information so reported, or as a result of the employee's having made an inquiry or taken any other action to ensure the accuracy of any information reported under

that division. For purposes of this division, disciplinary or retaliatory action by the employer includes, without limitation, doing any of the following:

(1) Removing or suspending the employee from employment;

(2) Withholding from the employee salary increases or employee benefits to which the employee is otherwise entitled;

(3) Transferring or reassigning the employer;

(4) Denying the employee a promotion that otherwise would have been received;

(5) Reducing the employee in pay or position.

(C) An employee shall make a reasonable and good faith effort to determine the accuracy of any information reported under division (A)(1) or (2) of this section. If the employee who makes a report under either division fails to make such an effort, he may bs subject to disciplinary action by his employer, including suspension or removal, for reporting information without a reasonable basis to do so under division (A)(1) or (2) of this section.

(D) If an employer takes any disciplinary or retaliatory action against an employee as a result of the employee's having filed a report under division (A) of this section, the employee may bring a civil action for appropriate injunctive relief or for the remedies set forth in division (E) of this section, or both, within one hundred eighty days after the date the disciplinary or retaliatory action was taken, in a court of common pleas in accordance with the Rules of Civil Procedure. A civil action under this division is not available to an employee as a remedy for any disciplinary or retaliatory action taken by an appointing authority against the employee as a result of the employee's having filed a report under division (A) of section [24.34] of the Revised Code.

(E) The court, in rendering a judgment for the employer in an action brought pursuant to division (D) of this section, may order, as it determines appropriate, reinstatement of the employee to the same position he held at the time of the disciplinary or retaliatory action and at the same site of employment or to a comparable position at that site, the payment of back wages, full reinstatement of fringe benefits and seniority rights, or any

combination of these remedies. The court also may award the prevailing party all or a portion of the costs of litigation, and if the employee who brought the action prevails in the action, may award the prevailing employee reasonable attorney's fees, witness fees, and fees for experts who testify at trial, in an amount the court determines appropriate. If the court determines that an employer deliberately has violated division (B) of this section, the court, in making an award of back pay, may include interest at the rate specified in section 1343.03 of the Revised Code.

(F) Any report filed with the inspector general under this section shall be filed as a complaint in accordance with section 121.46 of the Revised Code.

(1990 H 588, eff. 10-31-90; 1988 H 406)

OCCUPATIONAL SAFETY AND HEALTH ACT
29 U.S.C. §651, OSHA SECTION 2

§651. Congressional statement of findings and declaration of purpose and policy

[(a)] The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources--

(10) by providing an effective enforcement program which shall include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition;

(11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health

laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of

occupational safety and health, to develop plans in accordance with the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith;

(12) by providing for appropriate reporting procedures with respect to occupational safety and health which procedures will help achieve the objectives of this Act and accurately describe the nature of the occupational safety and health problem;

29 U.S.C. §652
OSHA SECTION 3

Definitions

For the purposes of this Act --

(10) The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act [enacted Dec. 29, 1970.]

29 U.S.C. §653(b)
OSHA SECTION 4(b)

Geographic applicability; judicial enforcement; applicability to existing standards; report to Congress on duplication and coordination of Federal Laws; workmen's compensation law or common law or statutory rights, duties, or liabilities of employers and employees unaffected

(b) (1) Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 USC §2021) [42 USCS § 2021], exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

(4) Nothing in this Act shall be construed to supersede or

in any manner affect any workmen's compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to diseases, or death of employees arising out of, or in the course of, employment.

29 U.S.C. 654(a)
OSHA SECTION 5(a)

§654. Duties of employers and employees
(a) Each employer--
(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
(2) shall comply with occupational safety and health standards promulgated under this Act.

29 U.S.C. § 660(c)
OSHA SECTION 11(c)

Discharge or discrimination against employee for exercise of rights under 29 USCS §§ 651 et seq.; prohibition; procedure for relief. (1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.
(2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may, within thirty days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of the such complaint, the Secretary shall cause such investigation

to be made as he deems appropriate. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district court shall have jurisdiction, for cause shown to restrain violations of paragraph (1) of this subsection and order all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay.

(3) Within 90 days of the receipt of a complaint filed under this subsection the Secretary shall notify the complainant of his determination under paragraph 2 of this subsection.

29 U.S.C. §667(a), (b)
OSHA SECTION 18(a), (b)

State jurisdiction and plans

(a) Assertion of State standards in absence of applicable Federal standards.

Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety and health issue with respect to which no standard is in effect under section 6 [29 USCS § 655.]

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards.

Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 [29 USCS § 655] shall submit a State plan for the development of such standards and their enforcement.

ENERGY REORGANIZATION ACT
42 U.S.C. §5851(h)

(h) Nonpreemption. This section may not be construed to expand, diminish or otherwise affect any right otherwise available to an employee under Federal or State law to redress the employee's discharge or other discrimination action taken by the employer against the employee.

CODE OF FEDERAL REGULATIONS

29 C.F.R. 1902.3(b)(1)

1) The State plan shall provide a **program for the enforcement** of the State standards which is, or will be, **at least as effective as that provided by the Act,** and provide assurances that the State's enforcement program will continue to be at least as effective as the Federal program. Indices of effectiveness of the State's enforcement plan against which the Assistant Secretary will measure the State plan in determining whether it is approvable are set forth in §1902.4(c). (emphasis added).

29 C.F.R. 1902.4(c)(2)(v)

(v) Provides necessary and appropriate protection to an employee against discharge or discrimination in terms and conditions of employment because he has filed a complaint, testified or otherwise acted to exercise rights under the Act for himself or others, by such means as providing for appropriate sanctions against the employer for such actions and by providing for the withholding, upon request, of the names of complainants from the employer.

29 C.F.R. §1954(3)(e)

(e) Discrimination Complaints. State plan provisions on employee discrimination do not divest the Secretary of Labor of any authority under §11(c) of the Act. The federal authority to investigate discrimination complaints exists even after an affirmative 18(e) determination (See, South Carolina decision 37 F.R. 25932, December 6, 1972). The employee complaints alleging discrimination under §11(c) of the Act will be subject to federal jurisdiction.

ORIGINAL

No. 97-478

Supreme Court, U.S.
FILED
OCT 30 1997
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STRUCTURAL FIBERS and ESSEF CORPORATION,

Petitioners,

v.

JAMES KULCH,

Respondent.

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, James Kulch, respectfully requests leave to file the attached Brief in Opposition to Petition for Certiorari without prepayment of costs and to proceed *in forma pauperis*. Mr. Kulch has not previously requested or been granted leave to proceed *in forma pauperis* in any court.

The decision below is an employment discrimination case involving retaliatory discharge, and Mr. Kulch has been unemployed since his termination from Structural Fibers in October, 1991. Moreover, injuries inflicted upon Mr. Kulch by Petitioner have rendered him unable to work, and he has collected Social Security Disability Income for the past several years. An Affidavit of poverty is attached in support of this Motion.

Respectfully submitted,

Patrick J. Perotti (0005481)
Susan E. Rusnak (0061892)
DWORKEN & BERNSTEIN
CO. L.P.A.
153 East Erie Street, Suite 304
Painesville, OH 44077
(440) 946-7656/352-3469

Counsel of Record for
Respondent James Kulch

CERTIFICATE OF SERVICE

One copy of Respondent's Motion for Leave to file Brief in Opposition to Petition for Certiorari, *In Forma Pauperis*, and Brief in Opposition to Petition, was sent via regular U.S. mail on this 30th day of October, 1997, to the following counsel:

Gregory Szuter, Counsel for Petitioner
Roetzel & Andress
1650 One Cleveland Center
Cleveland, OH 44114

Patrick J. Perotti (0005481)
Susan E. Rusnak (0061892)

Counsel for Respondent
James Kulch

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jim Kulch, am the ~~Respondent~~ in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes ___ No ✓
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. October 1991

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes ___ No ✓ Collect Social Security Disability Income.

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or savings account? Yes ✓ No ___

   a. If the answer is yes, state the total value of the items owned.
   Checking account for my wife's income, used to pay bills from paycheck to paycheck.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes ✓ No ___
   1984 Chevy van; 1985 Chevy Camaro.
   a. If the answer is yes, describe the property and state its approximate value.
   My wife and I own our house, are still paying mortgage.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on: October 15, 1997.

Susan Rusnak

SUSAN E. RUSNAK, Attorney
NOTARY PUBLIC - STATE OF OHIO
My Commission Has No Expiration Date
Section 147.03 O.R.C.

Jim Kulch
(Signature)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

STRUCTURAL FIBERS INC., and ESSEF CORPORATION,	)	CASE NO.
Petitioner,	)	
v.	)	**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI**
JAMES KULCH,	)	
Respondent.	)	

Respondent, through counsel, herein submits his Brief in Opposition to the Petition for Certiorari.

Respectfully submitted,

Patrick J. Perotti, #0005481
Susan E. Rusnak, #0061892
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(440) 946-7656/352-3469

Counsel of Record for
Respondent James Kulch

JURISDICTION

Respondent emphatically objects to the Petitioner's characterization of jurisdiction in this case. First, the Petitioner's purported "federal question" or "federal conflict" was first raised in a motion to reconsider the Supreme Court of Ohio's decision below. Since Petitioner's assertion of the federal arguments was untimely, this Court is without jurisdiction to grant certiorari.

On the merits, Petitioner argues that the Supreme Court of Ohio has violated the "neutrality provision" of the Occupational Safety and Health Act, (OSHA), by citing that statute in support of Ohio's recognition of workplace safety as an important public policy. But the "neutrality provision" cited by Petitioner addresses only OSHA neutrality respecting workers compensation and personal injury cases involving "injuries, diseases or death of employees arising out of, or in the course of, employment." 29 U.S.C. Section 653(b)(4), OSHA Section 4(b)(4). It does not address the remedies of wrongful discharge in employment. Respondent, James Kulch, brought this case in tort, seeking Ohio statutory and common law remedies for wrongful discharge.

SUMMARY OF PROCEEDINGS BELOW

This case commenced when Respondent James Kulch filed suit against his former employer, Structural Fibers Inc., asserting claims of retaliatory discharge and other tortious conduct. Kulch asserted that his firing was motivated by his complaint to the Occupational Safety and Health Administration (OSHA). Kulch's claims sounded entirely in Ohio statutory and common law, including wrongful discharge in violation of Ohio public policy.

Because the public policy tort was newly announced in Ohio, the trial and appeals courts granted summary judgment in favor of Structural Fibers. The Ohio Supreme Court accepted the case for review, heard oral argument, and reversed. In pertinent part, the Ohio court found that Kulch could bring an Ohio common law claim for retaliatory discharge in violation of public policy because he complained to OSHA. Significantly, the Ohio Supreme Court did not borrow or use any standards from OSHA.

Following the Ohio Supreme Court's decision, Structural Fibers filed a motion for reconsideration. Structural Fibers argued, for the first time, that by finding an Ohio public policy in favor of promoting workplace safety to support the tort of wrongful discharge, the Supreme Court of Ohio violated Section 4(b)(4) of the OSHA statute. Ohio law mandates waiver of arguments which are not timely asserted. State ex. rel. Zollner v. Industrial Commission, 66 Ohio St.3d 276 (1993)(party who fails to raise an argument in court below waives right to raise it in Supreme Court); Thompson v. Preferred Risk Mutual Ins. Co., 32 Ohio St.3d 340 (1987)(same). Thus, the Supreme Court of Ohio refused to reconsider its decision.

Structural Fibers now petitions this Court for review.

ARGUMENT

I. Petitioner's federal arguments were not timely raised in the proceedings below, so certiorari should be denied.

Review by the United States Supreme Court is not a matter of right. Only the most compelling cases presenting federal questions or conflicts are granted certiorari. When review of state court decisions is sought, standards for review are more exacting:

> **[T]he claim must be asserted at the proper time and in the proper manner by pleading, motion or other appropriate action under the state system of pleading and practice...**

Atlantic Coast Line R.R. Co. v. Mims, (1917) 242 U.S. 532.

In this case, Structural Fibers never raised its 4(b)(4) federal question argument until after the decision of the Supreme Court of Ohio, in its motion for reconsideration. According to Ohio pleading and practice, Structural Fibers had already waived that argument by not asserting it in the trial and appeals courts. State ex rel Zollner v. Industrial Commission, 66 Ohio St.3d 276 (1993); Thompson v. Preferred Risk Mutual Ins. Co., 32 Ohio St.3d 340 (1987). Therefore the Supreme Court of Ohio summarily denied Structural Fibers' motion for reconsideration.

Structural Fibers' failure to timely argue the federal issues bars not only reconsideration in the Supreme Court of Ohio, but this Court's review as well. This Court has declined to review decisions of state supreme courts, when the issue on which certiorari is sought was not raised until a motion for reconsideration of the state supreme court decision. See, e.g., Miller v. Cornwall, (1897) 168 U.S. 131, 133 (declining review of state supreme court decision construing a state statute, when argument on which certiorari is sought was not raised until motion for rehearing); McGarrity v. Delaware River Bridge Commission, (1934) 292 U.S. 19, 20 (dismissing appeal for "want of a properly presented substantial federal question," when it was not raised until motion for rehearing in state supreme court).

Because Structural Fibers never timely raised the federal OSHA 4(b)(4) question in the courts of Ohio, its Petition for Certiorari does not properly present a federal

question for this Court's review. Therefore, the petition should be dismissed.

II. OSHA does not preempt Ohio common law remedies for retaliatory discharge from employment for reporting concerns about workplace safety.

Petitioner principally argues that OSHA's so-called "neutrality provision," 29 U.S.C. Section 653(b)(4), OSHA Section 4(b)(4), precludes the State of Ohio from referring to the OSHA statute in support of common law employment discharge actions. This section provides:

> [N]othing in this Act shall be construed to supersede or in any manner affect any workers' compensation law or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the course of employment.

29 U.S.C. Section 653(b)(4), OSHA Section 4(b)(4). Petitioner argues that Ohio "may not use any part of OSHA, standards or otherwise, to affect state law in any way including employment discharge torts." Structural Fibers' Petition for Certiorari, p. 16.

Petitioner's argument is misplaced. The OSHA "neutrality provision" on its face only deals with physical injuries incurred in employment: "workers' compensation," and **"injuries, diseases, or death of employees arising out of, or in the course of employment."** Id. Section 4(b)(4) does not address wrongful discharge employment claims.

Legislative history concerning this section is equally instructive that this provision has nothing to do with wrongful discharges; rather, it is intended to avoid OSHA being used as a super, federal worker's compensation scheme, in derogation of state laws:

> Dear Mr. Chairman: This is in response to your recent request for information upon which to base a reply to Mr. James E. Bailey, Legislative Counsel, American Society of Insurance Management, Inc.

> **In his letter, Mr. Bailey expresses concern that under proposed legislation dealing with occupational health and safety "an injured employee could claim violation of the requirements of the legislation and thus bypass the applicable workmen's compensation benefits through an action in the Federal courts."**
>
> **The provisions of S.2788, the Administration's proposed Occupational Safety and Health Act of 1969 would in no way affect the present status of the law with respect to workmen's compensation legislation or private tort actions.**

Occupational Safety and Health Act of 1969: Hearings on H.R. 843, H.R. 3809, H.R. 4294 and H.R. 13373 before the Select Subcomm. on Education and Labor, 91st Cong., 1st Sess., Part 2 at 1592-1593 (letter of L.H. Silberman, Solicitor of Labor.) See also, Frohlick Crane Serv. Inc. v. Occupational Safety & Health Review Comm'n, (10th Cir. 1975) 521 F.2d 628, 631 ("by this particular provision Congress simply intended to preserve the existing private rights of an injured employee, which rights were to be unaffected by the various sections of the Act itself.")

Thus, the "neutrality provision," 29 U.S.C. Section 653(b)(4), limits only "workers' compensation" and "injuries, diseases, or death of employees arising out of, or in the course of, employment." In this area, the states may not inject OSHA regulations or standards to support a personal injury claim. So long as the terms of OSHA are not injected into state workers' compensation or personal injury actions, neutrality is respected:

> [W]hen a worker actually asserts a claim under the workmen's compensation law or some other state law, Section 4(b)(4) intends that neither the worker nor the party against whom the claim is made can assert that any OSHA regulation or the OSH Act itself preempts any element of the state law.

Startz v. Tom Martin Construction Co., (N.D. Ill. 1993) 823 F. Supp. 501, 505.

Petitioner argues that a state's injection of OSHA regulations or standards into its substantive personal injury law would risk interference with OSHA's preemption on health and safety issues. Section 18(a) of the OSH Act prohibits states' interference with "any occupational safety or health issue" for which federal standards are already in place. 29 C.F.R. 1901.2. An OSH "standard" within the scope of the act "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. Section 652(8). Accord: Pratico v. Portland Terminal Co., (1st Cir. 1985) 783 F.2d 255, 266 (OSHA Section 4(b)(4) intended "to keep OSHA regulations from having any effect on the operation of the worker's compensation scheme itself.") But the problem is, this is a wrongful discharge case. This is not a situation where a state court is borrowing an OSHA provision, e.g. guardrails, to set the standard of care in a state law tort suit.

Respondent does not assert any claim implicating OSHA's substantive health and safety standards into Ohio law. These are the areas of law which are subject to the "neutrality" provisions of OSHA; Kulch's claims do not concern those provisions.

Rather, Respondent James Kulch brings his claim under the Ohio common law and statutory law which protects whistleblowers from retaliation in their employment. Petitioner concedes that Kulch exhausted his administrative remedies under OSHA, and that Kulch does not have a private cause of action under the anti-retaliation provision of that statute. His claim is grounded entirely in Ohio law.

State actions arising out of employment, including common law claims for employment discrimination and wrongful discharge, are wholly independent of the OSHA regulatory scheme. Accordingly, in employment discrimination cases alleging retaliation against the employee for complaining of OSHA violations, courts hold that state common law claims recognizing wrongful discharge in violation of public policy are not "neutralized" by OSHA. See, Kilpatrick v. Delaware County S.C.P.A., (E.D. Pa. 1986), 632 F.Supp. 542, 549-50; McElroy v. SOS International, (N.D. Ill. 1989), 730 F. Supp. 803, 807.

A retaliatory discharge claim based upon complaints of OSHA violations is not a "standard" as contemplated by OSHA's provisions, McElroy, supra, 730 F.Supp. at 807. Nor is it a physical "injury, disease or death incurred in employment" within the scope of the neutrality provision.

Because James Kulch's claim, and the decision of the Ohio Supreme Court, is based on Ohio common and statutory law, having nothing to do with the OSHA neutrality provisions; and the purported federal question of 4(b)(4) was not timely raised in proceedings below; Petitioner's request for certiorari is not well taken and should be denied.

Respectfully submitted,

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October 30, 1997

United States Supreme Court
Attention: Clerk of Court
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Re: Structural Fibers v. James Kulch, Case No. 97-478

Dear Clerk:

Please find enclosed one original and 9 copies of Respondent's Motion for Leave to file Brief in Opposition to Petition for Certiorari, Affidavit, and Brief, to be filed in the above captioned case.

Please call me at (440) 946-7656 if you have questions about the enclosed.

Very truly yours,

Susan E. Rusnak
Counsel for Respondent James Kulch

cc: Gregory Szuter,
Counsel for Petitioner

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97-478

CERTIFICATE OF SERVICE

I, John Gallagher, hereby certify that 3 copies of the foregoing Petitioner's Reply Brief were sent via U.S. Mail to the following parties listed below this 7th day of November, 1997:

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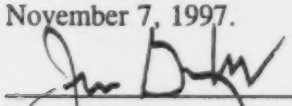
I further declare under penalty of perjury that the foregoing is true and correct. This Certificate is executed on November 7, 1997.



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No. 97-478

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

STRUCTURAL FIBERS, INC. and
ESSEF CORPORATION,
Petitioner,

v.

JAMES KULCH,
Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF OHIO

PETITIONER'S REPLY BRIEF

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STATEMENT OF PROCEEDINGS

Petitioner demonstrated that the issue of the applicability of OSHA §4(b)(4) to state employment torts is ripe for certiorari. Respondent opposes by urging 1) that this Court should dismiss the petition on procedural grounds; and 2) that, on the merits, OSHA §4(b)(4) does not "preempt" his claim. Both are ill conceived arguments.

ARGUMENT

I. PETITIONER HAS PRESERVED THE FEDERAL ISSUE FOR CERTIORARI BY PRESENTING THE FEDERAL QUESTION IN CONFORMANCE WITH STATE PROCEDURE.

Presentation of a federal issue on a motion for rehearing to the highest court of a state is reviewable by writ of petition for writ of certiorari. There would certainly be jurisdiction had the Ohio court granted the rehearing. There should not be a different result by virtue of the fact that the Ohio Supreme Court did not grant the motion[1]. 16B Wright & Miller, FEDERAL PRACTICE & PROCEDURE,

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[1] Although this is not a preemption case, but a case that turns on another federal jurisdictional statute, Section 4(b)(4), International Longshoremen Assn. v. Davies (1986), 106 S.Ct. 1901, 1910-1913, 476 U.S. 380, 387-373, 90 L.Ed.2d 389 may be instructive. Failure to plead or argue preemption until a motion j.n.o.v. does not excuse the state court of appeals form considering it. The court held that the state procedural rules are not independent of the antecedent federal question of whether the federal law ousted state jurisdiction.

Jurisdiction and Related Matters, §4022, p. 332. This is true for two reasons. First, Appellant is presenting a federal question that arose out of an unexpected decision by the Ohio Supreme Court on the merits departing from its own precedent. Secondly, under Ohio practice, a petition for rehearing is a sufficient mechanism to raise a question of law that was not considered previously.

A federal issue may be raised in a motion for rehearing where it only became relevant when the state court overruled its prior decisions. PruneYard Shopping Center v. Robbins 100 S.Ct. 2035, 2043, 447 U.S. 7485, 64 L.Ed.2d 731 (1980) at note 9:

> "...federal claims...have been adequately presented even though not raised in lower courts when the highest state court renders and unexpected interpretation of state law or reverses its prior interpretation."

See similarly in Great Northern Railway v. Sunburst Oil & Refinery Co. 53 S.Ct. 145, 149, 287 U.S. 53, 58, 366, 77 L.Ed. 360 (1932) (constitutionality raised in motion for rehearing) and Ex rel. Missouri Insurance Company v. Gehner 50 S.Cpt. 326, 327, 281 U.S. 313, 320, 74 L.Ed. 870 (1930)(state supreme court adopted a tax apportionment method not used by the agency or considered below).

Secondly, raising federal claims in a motion for rehearing is sufficient where the state system frequently treats such petitions as sufficient. Bankers Life & Casualty Company v. Crenshaw 108 S.Ct. 1645, 1650, 486 U.S. 71, 77, 100 L.Ed.2d 62 (1988) following Hathorn v. Lovorn 102 S.Ct. 2421, 457 U.S. 255, 261-265, 72 L.Ed.2d 824 (1982).

(A) It Is Timely to Raise Federal Claims in a Motion for Rehearing in a State Supreme Court which Treats such Motions as Sufficient.

The Ohio Supreme Court Rules of Practice, Rule XI, §2 (attached as Appendix Q, p. A238) states that such a motion must be confined strictly to the grounds for rehearing and "shall not reconstitute a reargument of the case." Therefore, substantively the motion to reconsider may not present what has already been submitted previously.

Exemplary of this are the reconsiderations before the Ohio Supreme Court in the matter of the City of Rocky River v. State Employment Relations Board, 39 Ohio St.3d 196, 530 N.E.2d 1 (Ohio 1988), which was subject to four published decisions and are described below.

The Rocky River litigation was a suit for declaration of the constitutionality of the state statute requiring binding arbitration between cities and the unions representing city employees. In its initial decision, (decided November 2, 1988) the Ohio Court held that R.C. 4117.14(I) was unconstitutional. By the fourth decision [43 Ohio St.3d 1, 539 N.E.2d 103, decided May 10, 1989], R.C. 4117.14(I) was held constitutional. Between November 1988 and May 1989, two unusual developments occurred. The composition of the Ohio Supreme Court changed as a result of election. Also, two motions to reconsider had intervened, with one such motion considered by each of the two constituted panels.

The decision on the first motion to reconsider [herein Rocky River II, 40 Ohio St.3d 606, 533 N.E.2d 270 decided December 22, 1988 attached as Appendix R] was written by the then (and current) Chief Judge Moyer. The motion had urged that the court declare whether the enforcement of a grievance arbitration award under 4117.09(B)(1) was constitutional. Chief Judge Moyer stated "that issue was not

raised, was not considered, and was not decided in the majority opinion." He explained that a different statute, R.C. 4117.14(I), was declared in the former decision and that R.C. 4117.14(H) was also declared in the body of the decision although not in the syllabus. Because R.C. 4117.09(B)(1), was not raised and not argued and not decided, but had been raised in the motion for reconsideration, Chief Judge Moyer proceeded to consider the effect of the decision with respect to that statute. The court found that part of R.C. 4117.09(B)(1) was inconsistent with the prior decision and part was not. Chief Judge Moyer concluded that: "In all other respects, the motions for reconsideration and clarification are overruled as they have raised no germane arguments that were not considered by the court in the disposition of the appellant's appeal." (emphasis added) Id. at 607.

Rule IX requires that a motion for rehearing not submit a matter previously considered. The Rocky River II reconsideration is exemplary of just that. It's sole basis for granting reconsideration was a statute not considered before. The basis for not reconsidering the balance of the motion was that the rest of the motion did not submit matter that was not considered by the court earlier.

After the reconsideration in Rocky River II, the Ohio Supreme Court entertained another such motion. After the election reconstituted the panel of the Court, but ostensibly timely within the Court's rules, the litigants filed a motion to reconsider the first reconsideration[2]. The second reconsideration [herein Rocky River III, 41 Ohio St.3d 602, 535 N.E.2d 657 decided February 10, 1989, attached hereto as Appendix S] raised three discrete points (c.f. Holmes dissenting at 608). Notwithstanding the limited scope of the

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[2] Rule XI has since been changed to limit the type of decisions subject to reconsideration.

second motion, the court held "The motion for reconsideration is granted as to all issues in this cause...Case to be decided on merit briefs previously filed. No oral argument." Id. at 602.

Of particular note was the case that was cited with approval, OAMCO v. Lindley (1987), 29 Ohio St.3d 1, 503 N.E.2d 1388 (Ohio 1987). In OAMCO, a first motion on rehearing had been ruled upon but the court accepted a second motion on the appellees' contention that "the scope and effect of our ruling with regard to the prospective application of the decision is unclear..." (Id. at 2, emphasis added).

In the instant case, Petitioner's motion for reconsideration addressed the future application of OSHA §4(b)(4) to the decision on the merits which, departing from precedent, created a new cause of action directly and indirectly based on OSHA.

Indeed, the majority Rocky River III stated, "The fact is that no precedent governs the procedural matter which is before us." Id. at 604. Petitioner does not go so far as the court to say there is no standard. Petitioner has relied on the standard of Rule XI and Rocky River II. The absence of any standard should mean that granting a motion to reconsider is totally arbitrary with the court. That is, anything may be submitted to reopen the case without limitation. Certainly that is broader than need be, but if it is so, Petitioner submits it has met such a very loose standard as well.

(B) The Federal Question Arose for the First Time as an Unexpected Basis for the Decision by the Ohio Supreme Court.

In this case, the Ohio Court issued an unexpected extension of Ohio law to incorporate OSHA §11(c), 29 U.S.C. §660(c) into state public policy as a tort. Kulch v. Structural Fibers 78 Ohio St.3d 134 (Ohio 1997) Syllabus 1.

The holding both directly and indirectly uses OSHA to support a state employment tort cause of action. These steps were not argued by the parties, are contrary to Ohio precedent and were criticized by the dissent.

The Ohio court adopted a proposition of law, Kulch Syllabus 1, that was not urged by the parties. The proposition argued by the parties was whether Ohio common law provided a tort remedy for the state whistleblowers statute.[3] The Ohio Court's rules require the Appellant to submit a proposition of law that could serve as a syllabus. Ohio Supreme Court Rules of Practice, Rule VI, §1 (Appendix Q, p. A238). Respondent's Proposition of Law No. 2 did not mention OSHA but reads:

> The Ohio Whistleblowers Statute, R.C. 4113.52, does not preempt Greeley common law public policy tort claims involving whistleblowing. Greeley v. Miami Valley Maintenance Contractors, Inc., 49 Ohio St.3d 228 (1990) applied. (Appendix F, p. A129)

See also Petitioner-Appellee's Proposition of Law No. 3, Appendix E, p. A103.

In the memoranda in support of and opposing jurisdiction in the Ohio Supreme Court, the threshold to further appeal to that body, the parties both addressed the public policy tort issue as a question of whether the whistleblower statute adopted by the General Assembly preempted the public policy tort claim by evidence of the

---

[3] The remand instruction to consider whether an OSHA filing raised issues of state environmental crimes to an "appropriate authority," was too bizarre for either party to have anticipated in a proposition of law, and they did not.

remedial provisions of the statute. Appendix H, p. A145 and Appendix I, p. 160, and p. A174. Similarly the argument to the Court of Appeals, was postured in the same vein. See Appellant's Assignment of Error No. 4, Appendix L., p. A213 and Appellee's Counter-Statement to Assignment of Error No. 4 at Appendix K, p. A197.

Instead the Court held that OSHA itself was an independent source of Ohio public policy for the employment tort.(c.f. Kulch at Syllabus 1, and pp. 151, 153, 162, (A62, A73, A83) and Petition, pp. 6-12.)

Both the merit briefs to the Supreme Court made nearly identical references to OSHA §11(c). Respondent's brief did not argue the proposition of law adopted by the Ohio court. His argument with respect to OSHA §11(c) was simply that since OSHA did not provide a private remedy, a private remedy ought to be extended to the employee by virtue of the state whistleblower statute under Greeley. Appendix F, p. A125.

In the merit brief, Petitioner similarly observed OSHA §11(c) did not provide a private right of action. However, Petitioner demonstrated that the prior holding in Painter v. Graley, 70 Ohio St.3d 377, 639 N.E.2d 51 (Ohio 1994), Syllabus 3, did not include federal statutes as public policy that would support a tort cause of action. Appendix E, p. 117-119. The Painter syllabus was reaffirmed later in Collins v. Rizkana, 73 Ohio St.3d 65 (Ohio 1995). See Petition for Writ of Certiorari p. 9-10 and the Petitioner's Merit Brief, Appendix E, p. A118.

As a result of an unexpected decision that was inconsistent with prior precedent, the Petitioner's sole resort was to submit the federal issue in a petition for rehearing to demonstrate to the court a hitherto unconsidered matter that would affect the prospective application of its holding in this case. Those circumstances are clearly both, within Ohio and federal practice, a means by which an issue can be presented

to the Ohio Supreme Court and a federal issue preserved for a petition for writ of certiorari.

So unexpected and ill considered was the extension of Ohio law to incorporate the OSHAct that Justice Cook in Kulch dissenting criticized it as one of the many difficulties that the majority opinion presented. Justice Cook wrote:

> "As for reliance on the Occupational Safety and Health Act of 1970 (OSHA) Section 651 et seq., Title 29, U.S. Code, it is questionable, even as a general proposition, to look to a federal statute as a source of Ohio public policy. ... Without meaningful analysis of the relevant statute, the majority announces that OSHA creates a clear statement of public policy favoring 'work place safety' and Greeley thereby permits a cause of action for retaliatory discharge grounded in common law. Such reasoning is dubious in light of the fact that although Section 660(c), Title 29, U.S. Code provides whistleblowers a remedy for retaliatory discharge, that section does not provide whistleblowers with a private cause of action. Taylor v. Brighton Corporation (C.A.6, 1980), 616 F.2d 256. ...
>
> This court's creation of a Greeley claim based on the federal policy to promote "work place safety" permits an employee to do in Ohio courts that which OSHA forbid in federal court -- to bring a private cause of action. The majority adopts that portion of the federal public policy supporting that determination while ignoring the policy-driven balancing components of that legislation. As a consequence, we are left with an exception to

> the employment at-will doctrine purportedly grounded on federal public policy that is more transparent than it is clear. Kulch at 165, Appendix p. A87-88.

The Ohio Court unexpectedly departed from precedent and from the issues presented to it. An analysis of OSHA that the dissent desired would have focused on the OSHA §4(b)(4) issue. The motion for rehearing was the only means to preserve the issue in this circumstance.

II. RESPONDENT OFFERS NO CREDIBLE OPPOSITION TO THE GRANTING OF CERTIORARI ON THE MERITS OF THE APPLICATION OF OSHA §4(b)(4) TO THE OHIO PUBLIC POLICY EMPLOYMENT TORT.

In precis, the Respondent's merit position is that the neutrality provision OSHA §4(b)(4) only deals with physical injuries not wrongful discharges; that only federal standards have preemptive affect under Section 18(a), and that Petitioner brought his claim under Ohio common and statutory law ("entirely") that should not be "neutralized" by OSHA. Each and every of these points are inapposite. Respondent is suing for damages related to his heart condition. Appendix T, Plaintiff's cardiologist expert report on remand. The preemption by the standards is simply the wrong issue under discussion. Finally, it is OSHA that is "neutralized" by Congress in OSHA §4(b)(4).

Respondent misses the thrust of the Ohio court's decision and that of the Petition for Writ of Certiorari.

CONCLUSION

For the reasons submitted herein as well as those presented in its petition for writ of certiorari, the Petitioner prays the writ be granted.

Respectfully submitted,

/s/_____
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Dated: November 10, 1997

APPENDIX Q

Ohio Supreme Court Rules of Practice

RULE VI. BRIEFS ON THE MERITS IN APPEALS

Section 1. Appellant's Brief.

(B)(4) An argument, headed by the proposition of law that appellant contends is applicable to the facts of the case and that could serve as a syllabus for the case if appellant prevails. See Drake v. Bucher, Supt. (1966), 5 Ohio St.2d 37, at 39. If several propositions of law are presented, the argument shall be divided with each proposition set forth as a subheading.

RULE XI. ENTRY OF SUPREME COURT JUDGMENT; MOTIONS FOR RECONSIDERATION AND FOR REOPENING; ISSUANCE OF MANDATE

Section 2. Motion for Reconsideration

(A) A motion for reconsideration may be filed within 10 days after the Supreme Court's judgment entry or order is filed with the Clerk. A motion for reconsideration shall be confined strictly to the grounds urged for reconsideration, shall not constitute a reargument of the case, and may be filed only with respect to the following:

(1) The Supreme Court's refusal to grant jurisdiction to hear a discretionary appeal;

(2) The sua sponte dismissal of a case;

(3) The granting of a motion to dismiss;

(4) A decision on the merits of a case.

(B) An amicus curiae may not file a motion for reconsideration without prior leave of the Supreme Court.

(C) The Clerk shall refuse to file a motion for reconsideration that is not expressly permitted by the rule or that is not timely.

APPENDIX R

City of Rocky River,
Appellant,

v.

State Employment Relations Board, et al.,
Appellees.

No. 87-157

Supreme Court of Ohio

Submitted Dec. 13, 1988.

Denied Dec. 22, 1988.

City filed action seeking declaration that state statute requiring binding arbitration between representative of city's safety workers and city violated State Constitution. Trial court granted motions of state employment relations board and city fire fighter's union for summary judgment. City appealed, and the Court of Appeals, Cuyahoga county, affirmed. On further appeal, the Supreme Court, 39 Ohio St.3d 196, 530 N.E.2d 1, held that statute was unconstitutional to extent that it violated city's powers of local self-government and was improper delegation of municipal legislative authority. On motion for rehearing, the Supreme

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Court, Moyer, C.J., held that decision did not render invalid portion of another statute permitting suits to enforce grievance arbitration awards.

Motions for reconsideration and clarification denied in part and granted in part.

Sweeney, Douglas and Herbert R. Brown, JJ., dissented.

LABOR RELATIONS

232A	**------**
232AI	**In General**
232Ak7	**Statutory Regulations in General**
232Ak8	**Validity of regulations.**

Ohio 1988.

State statute permitting party to agreement to bring suit for enforcement of award made by arbitrator is invalid only to extent that it permits enforcement of binding arbitration award made pursuant to unconstitutional state statute requiring binding arbitration of collective bargaining disputes between representatives of municipal employees and municipal employers. R.C. §§ 4117.01 et seq., 4117.09 (A, B), (B)(1).

[533 N.E.2d 271] Calfee, Halter & Griswold, Mark I, Wallach, William E. Coughlin, John E. Gotherman, Cleveland, and Russell A. Olson, Law Director, **Rocky River**, for appellant.

Anthony J. Celebrezze, Jr., Atty. Gen., and Joseph M. Osler, for appellee State Employment Relations Bd.

Joseph W. Diemert, Jr. & Associates Co., L.P.A.,

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Joseph W. Diemert, Jr., Mayfield Heights, and William F. Schmitz, Chardon, for appellee **Rocky River** Firefighters Assn., Local 695.

Berkman, Gordon, Murray & Palda and George W. Palda, Cleveland, for appellee AFSCME Ohio Council 8.

[1989 SERB 4-1] MOYER, Chief Judge.

Appellees have suggested in their memoranda in support of motions for rehearing and/or clarification that the majority opinion strayed from the issue presented by the appeal. They contend that the majority has declared that the enforcement of grievance arbitration awards as provided in R.C. 4117.09(B)(1) is unconstitutional. Appellees are mistaken. That issue was not raised, was not considered, and was not decided in the majority opinion. (See 39 Ohio St.3d 196, 530 N.E.2d 1.)

Because R.C. 4117.14(i) was declared unconstitutional, it was necessary to review the remainder of R.C. Chapter 4117 to determine whether other sections of the chapter needed to be declared invalid or modified in view of our narrow holding. We declared R.C. 4117.14(H) to be invalid because it gave the common pleas courts jurisdiction to review awards produced by binding arbitration that could no longer be made in view of our decision.

When we reviewed the language of R.C. 4117.09(B)(1), we observed that the last sentence in that subsection states: "A party to the agreement may bring suits for violation of agreements or
the . . ."

* * * * *

APPENDIX S

City of Rocky River,
Appellant,

v.

State Employment Relations Board, et al.,
Appellees.

No. 87-157

Supreme Court of Ohio,
Cuyahoga County.

Submitted Jan. 17, 1989.

Denied Feb. 10, 1989.

Appeal from the Court of Appeals for Cuyahoga County, No. 51299.

Calfee, Halter & Griswold, Mark I. Wallach, William E. Coughlin, John E. Gotherman, Cleveland, and Russell A. Olson, Law Director, **Rocky River**, for appellant.

Joseph w. Diemert, Jr. & Associates Co., L.P.A., Mayfield Heights, Joseph W. Diemert, Jr., Cleveland and William F. Schmitz, Chardon, for appellee **Rocky River** Firefighters Assn., Local 695.

Paul L. Cox, Columbus, and Kay E. Cremeans, Ashville, in support of motion for amicus curiae, Fraternal

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Order of Police of Ohio, Inc.

Cloppert, Portman, Sauter, Latanick & Foley, Robert W. Sauter, and Russell E. Carnahan, Columbus, in support of motion for amicus curiae, Fraternal Order of Police, Capital City Lodge No. 9.

Conway, Barclay, Deyo & Kuran Co., L.P.A., and Donald K. Barclay, Cleveland, in opposition to motion, for amicus curiae, Ohio Mun. League.

Kelley, McCann & Livingstone and Stephen M. O'Bryan, Cleveland, in opposition to motion, for amicus curiae, Ohio Mun. Attorneys Assn.

ON MOTION FOR RECONSIDERATION OF DENIAL OF MOTION FOR REHEARING.

The motion for reconsideration is granted as to all issues in this cause. See (1988), 39 Ohio St.3d 196, 530 N.E.2d 1, and (1988), 40 Ohio St.3d 606, 533 N.E.2d 270. Case to be decided on the merit brief previously filed. No oral argument.

SWEENEY, DOUGLAS, HERBERT R. BROWN and **RESNICK, JJ.**, CONCUR.

MOYER, C.J., and **HOLMES** and **WRIGHT, JJ.**, dissent.

HERBERT R. BROWN, Justice, concurring.

Ordinarily we do not write in procedural matters, and I would not in this instance, but for one dissent which lays a

false claim to the benefit of precedent, fails in a tortuous attempt to distinguish *Joseph v. Dever* (case No. 86-1688), and inaccurately states the facts of record.

First, the motion for reconsideration at issue was filed within ten days of the *final* decision in this case. The motions for rehearing filed on November 14, 1988 were granted in part. A clarification was issued on December 22, 1988. Thus the opinion of this court was not finalized until December 22, 1988. The motion before us was filed on January 3, 1989. While this may *appear* to be more than ten days after the decision, such is not the case. January 1 fell on Sunday and January 2 was a legal holiday (New Year's Day). Thus the ten-day period which would seemingly have expired on January 1 was extended (in accordance with the law) to January 3, the date the motion was filed.

Second, *Joseph v. Dever, supra*, cannot be distinguished. A denial of a motion to certify adjudicates the dispute between the parties every bit as much as a decision by this court on the merits. Our rules make no separate ***603** provision for motions to rehear decisions on motions to certify.

Such motions fall under Section 1, Rule IX, and must be filed within ten days of the [535 N.E.2d 658] decision. (FN1) Surely no one can embrace the logical result of the reasoning contained in one of the dissents--that there is no rule and no time limitation upon the reconsideration of our decisions on motions to certify. In *Joseph v. Dever, supra*, an author of one of today's dissents voted for not only a second motion to reconsider but also a *third*. Further (unlike the present case), there was no intervening decision by the court to trigger an additional period of time for the filing of the *Dever* motions.

Third, when one dissent labels the present case unprecedented, the dissent fails to recognize the court's history. This court and its predecessors have reversed decisions after the denial of a motion to rehear. Such was the case in *Wisniewski v. Wisniewski* (1985), 20 Ohio St.3d 20, 20 OBR 137, 485 N.E.2d 248 (rehearing denied on October 23, 1985; rehearing granted, case allowed, and case reversed by a vote of five to one on October 30, 1985).

In *OAMCO v. Lindley* (1987), 29 Ohio St.3d 1, 29 OBR 122, 503 N.E.2d 1388, this court, without dissent, took action on a motion for rehearing after a first motion for rehearing had been ruled upon. In that case, we said:

"On November 26, 1987, this court, on rehearing, decided the within cause. Appellee has now filed an additional motion for rehearing contending that the scope and effect of our ruling with regard to the prospective application of the decision is unclear and thereby presents the Tax Commissioner with difficulty in implementing our ruling uniformly and fairly.

"Finding several of the points made by the commissioner to be well-taken, the court treats appellee's motion for rehearing as a motion for clarification and [1989 SERB 4-28] grants the motion." *Id.* at 2, 29 OBR at 122, 503 N.E.2d at 1389. See *OAMCO v. Lindley* (1986), 27 Ohio St.3d 7, 27 OBR 427, 500 N.E.2d 1379.

Further, in *Newsome v. Newsome* (case No. 85-819), a rehearing was denied on August 30, 1985. A motion to "amend" the motion for rehearing was made on August 30, 1985. The author of one of today's dissents saw no problem in voting to grant a motion to "amend.".

Vlock v. Stowe-Woodward Co., 34 Ohio St.3d 602,

517 N.E.2d 544 represents yet another instance in which we (by allowing certiorari under a different case number) in effect reconsidered a case after denial of a motion for rehearing (see case Nos. 86-729, 86-2048, 87-220).

The fact is that no precedent governs the procedural matter which is before us. One dissent cites no case which holds that the action taken here is unlawful or improper. (FN2) There is ***604** nothing unlawful in the grant of a motion which is pending before us, where the grant expresses the will of a majority of the justices sworn to office on this court.

A final point is to be made, which perhaps best identifies the animus which informs one dissent in the present case. A change in the court took place between the decision on December 22, 1988 and the motion for reconsideration filed on January 3, 1989. Recognizing this change, one dissent states: "The decision of the majority here is very disturbing to me in that it unlawfully overturns a determination upon major issues made by the majority of the court as constituted last term. More specifically, this later pronouncement of the court will undoubtedly lead to a position significantly at odds with the stance of one member of the prior majority who is no longer present to articulate his position." The dissenter, if disturbed by such a prospect, should not [535 N.D.2d 659] ignore the history of 1986-1987. Examination of the rehearing docket for early 1987 reveals that on fifteen occasions members of the new court voted to rehear determinations "lawfully' made by the previous court in 1986. (FN3) In 1987 the justices who dissent ***605** today did not approve of earlier court determinations and set about to overturn them in (when compared to this year's transition) a somewhat wholesale

fashion. (FN4) Precedent (whether in substantive or procedural matters) is not [1989 SERB 4-29] a rationalization to be turned on and off to suit the whim of the beholder.

MOYER, Chief Justice, dissenting.

I concur in the thrust of the dissent of Justice Holmes; however, I believe the reference to "*stare decisis*" is premature, as no decision of the court changing the opinion in the case has been voted or announced.

It is also appropriate to set forth several significant facts that distinguish from this case the votes for rehearing in the cases referred to in footnote 3 of Justice Brown's concurrence in which rehearings of merit decisions were granted:

[535 N.E.2d 660] 1. In none of those cases was the motion before the court a motion to reconsider the denial of a motion to rehear a merit decision. All motions filed in those cases were motions to rehear a decision of the court on the merits, and were filed pursuant to Section 1, Rule IX of the Rules of Practice of the Supreme Court of Ohio.

2. The votes of "Moyer, C.J." to rehear those cases that had been decided just prior to his becoming a member of this court were based upon the extraordinary and unprecedented circumstances under which those cases were selected for oral argument, in violation of Section 1, Rule VII of the Rules of Practice of the Supreme Court of Ohio: were decided and announced during the last two months of the court session in 1986; and were the source of opinions of such low quality that in at least one of the cases two opposing parties requested a reconsideration or clarification of the court's opinion.

3. Although voting that rehearings should be granted in the cases cited by Justice Brown, "Moyer, C.J." did not participate in the rehearing of the merits in any of those cases.

Finally, perhaps the most important conclusion to be drawn from the most recent vote in this case and all that has been written about that vote is that we should adopt a judicious and rational written procedure for the disposition of motions that are filed under the circumstances of the motion filed herein and those referred to in Justice Brown's concurrence.

WRIGHT, J., concurs in the foregoing dissenting opinion.

HOLMES, Justice, dissenting.

I strongly ***606** dissent from the unprecedented and unlawfully determined decision of the majority.

The motion upon which the majority purports to base its determination has no legal basis in the rules of court, either for this court, any appellate court below, or the federal courts and moreover, is clearly prohibited by the limitations upon post-decision motions contained in the Rules of Practice of the Supreme Court. As such, the action today constitutes the unlawful reviving of a finalized determination of this court, which should be barred by the doctrine of *res judicata*.

The motion filed by appellee Local 695 with this court on January 3, 1989 was entitled a "Motion for Reconsideration of the Denial of Motion for Rehearing." This, of course, was preceded by a decision in this case announced on November 2, 1988, motions for rehearing

and/or clarification filed on November 14, 1988, a continuance and finally an order from this court issued December 22, 1988, which clarified the previous decision but flatly denied a rehearing on the merits. Incidentally, by no stretch of the imagination could our clarification *of* the merits be considered an action *on* the merits. This finalized the case at that time, leaving no other legal basis for challenging this court's determination. The denial of a rehearing was then, under the doctrine of *res judicata*, binding upon all the parties to the action as to all the issues which were or could have been raised therein.

As to the purported jurisdictional basis for the above "motive for reconsideration," there clearly is none, which fact was recognized by both the movant itself and all of the *amici curiae* in support. In the original motions for a rehearing of this court's decision, the movants expressly set forth their then claimed basis for jurisdiction as being "pursuant to Rule IX, [Section 1] of the Rules of Practice" of the Supreme Court of Ohio. This was entirely proper. The movant and the *amici* in support in the second motion have failed to set forth any basis for this court to exercise jurisdiction. Nor could they do so because there is no rule of this court which would permit such a "Motion for Reconsideration of the Denial of a Motion for Rehearing."

As a procedural matter, the sole rule of practice which controls the filing of post-decision motions i the above-cited Rule IX of our Rules of Practice. By its terms, post-decisional practice is limited to a single motion, after which the rule indicates that the case is officially ended. Section 1 of [535 N.E.2d 661] Rule IX states: "A motion for rehearing shall be filed within ten days *after the announcement of the decision*. Such motion must be confined strictly to the

grounds urged for rehearing and must not *constitute a reargument of the case*. * * *" (Emphasis added.)

Clearly this rule provides for "a" single motion for rehearing, as the language utilized is in the singular. No provision is made elsewhere for any other motion after this one is either granted or denied. Further, "the" motion filed is strictly defined as one for a rehearing of "the decision" in the case. This is made obvious by the warning that the motion cannot be a "reargument of the case," which, incidentally, all the motions for rehearing and for reconsideration in the instant case plainly ignored. Thus, the timing of the motion contemplated by the rule is clarified as immediately following the initial decision of this court, which decision evaluated the original substantive claims and arguments presented to us in the briefs and oral argument. The rule cannot be stretched to include reconsiderations of denials of motions for rehearing since it only provides ***607** for a "rehearing," which means the original oral hearing on the merits, and not a "reconsideration" of whatever imaginative pleading was last filed. Otherwise, we would be faced with the anomaly that cases could be kept alive in this court by interminable [1989 SERB 4-30] pleadings, with finality of actions being a sham and a potential doubling of our motion caseload. More importantly, from the standpoint of stability of the law, we could have reversals of the decisional law of this court following the election of a new judge or judges.

That this rule requires a finality of the decision in this and every other case following the denial of a motion for rehearing is made perfectly manifest by Section 2 of rule IX, which states:

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> "Ten days after the announcement of a decision on the merits, unless a motion for rehearing is filed, the Clerk shall issue a *mandate* in conformity to the entry of the Court. If a motion for rehearing is filed and denied, the *mandate* shall issue at the same time as the decision on the motion for rehearing. ***" (Emphasis added.)

The mandate of this court is its final command in the case, issued to the courts below, directing them to act in compliance with the decision and entry of this court. It is the principal means by which the determinations of this court are effectuated. By issuing our mandate, we finalize our decision and the case is then completed. Once final, our decision, as previously mentioned, becomes *res judicata* to the parties.

Furthermore, others have attempted to do what the movant has accomplished herein, *i.e.*, attempted to maintain an action before this court beyond the denial of a motion for rehearing. They have similarly utilized the very pleading form, or ones similar thereto, which the movant now displays, essentially framing such as motions to reconsider our denial of a motion to rehear our decision on the merits. See, *e.g.*, *State v. Hill* (No. 87-313); *State v. Ray* (1988), 37 Ohio St.3d 718, 532 N.E.2d 769; *Kondrat v. Byron* (No. 87-1419); *Joseph v. Dever* (No. 86-1688); *Viock v. Stowe-Woodward Co.*, 34 Ohio St.3d 602, 517 N.E.2d 544; *Akron v. Bilder* (1988), 39 Ohio St.3d 726, 534 N.E.2d 359, and (1988), 40 Ohio St.3d 711, 534 N.E.2d 851; *Senediak v. Senediak* (1988), 39 Ohio St.3d 722, 534 N.E.2d 358, and (1988), 39 Ohio St.3d 731, 534 N.E.2d 359; *LPI of Ohio, Inc. v. Colbert* (1988), 39 Ohio St.3d 722, 534 N.E.2d 358,

and (1988), 40 Ohio St.3d 707, 534 N.E.2d 851; *Upper Ohio Valley Presby. v. Covenant Presby. Church* (No. 88-1647), (1988), 40 Ohio St.3d 711, 534 N.E.2d 852, and (1989), 41 Ohio St.3d 709, 534 N.E.2d 1213.

In no prior case has this court ever allowed such a motion. Prior judicial administrations have gone so far as to strike them. We have, of course, allowed the filing of such motions in these cases. This we have done, not because the majority of this court viewed them as anything beyond the legal nullity that they are, but for reasons of administrative convenience. A case has always been considered and declared final upon the denial of the motion for rehearing and issuance of our mandate.

[535 N.E.2d 662] Although the initial motion for reconsideration was timely filed and, of course, denied by this court as it was constituted last term, the second motion was filed on January 3, 1989, well beyond the ten days allotted by our rules from the original decision in the case. Further, that the movant waited until January 3, 1989 to file its addendum ***608** motion would indicate its desire to avoid another ruling by this court as it was constituted prior thereto and to obtain a judgment from this court as newly constituted. Such action reveals a forum-shopping motivation of the worst sort and is a practice which this court, in its entirety, should unequivocally denounce.

Also, even supposing this second motion for reconsideration of our prior denial were to be considered valid, the decision of the majority goes well beyond that which was sought by appellee, Local Union 695, in its motion. The motion specifically sought only the clarification by this court of three points which the movant felt were initially unanswered by the court in its opinion on the merits

or the explanatory opinion in response to the first motion for reconsideration. These were as follows:

"1. Without the right to binding arbitration do municipal safety forces have the right to strike?

"2. Whether the decision applies to charter and non-charter municipalities, and whether the municipality must adopt an ordinance or law in conflict with R.C. 4117.41(I) in order to be exempt from the provisions of the statute?

"3. Does the unlawful delegation issue extend to all political subdivisions and not just municipalities? Can the State of Ohio through its own legislature delegate to a third person the authority to mandate the wages of its own employees as well as those of townships and counties?"

Rather than limiting its determination here to that which had been specifically requested by the union, the majority has gone far afield and granted not only the basic motion, but will entirely re-decide the case. Such a result has never before been experienced by this court during my tenure.

The decision of the majority here is very disturbing to me in that it unlawfully overturns a determination upon major issues made by the majority of the court as constituted last term. More specifically, this later pronouncement of the court will undoubtedly lead to a position significantly at odds with the stance of one member of the prior majority who is no longer present to articulate his position.

Lastly, the determination of the majority to rehear and redetermine this matter is completely at odds with the long-standing principle of *stare decisis* which, in the main, permits determinations of this court to remain intact unless valid new and changed public policy considerations are later presented to the court for its review. No new public policy

considerations were presented here for the majority's determination to provide a new hearing and determination upon this matter.

It has been suggested by some that the court has acted upon such motions as those now before us in prior cases. One particular example which, upon a surface reading might tend to so suggest, is the case of *Joseph v. Dever* (No. 86-1688). In that case, this court [1989 SERB 4-31] entered its initial decision on December 5, 1986, and denied the motion for reconsideration on December 31, 1986. Thereafter, with two new members on this court, we gave consideration to two later motions filed in this court, under various styles, which were clearly attempts to keep the case alive for consideration by the new panel.

Joseph v. Dever is most inapposite to the situation of the case here for three specific reasons. First, the *Dever* case presented us initially with a motion to certify the record wherein appellant Dever sought to have his case heard upon the merits before this court. In no fashion could Rule IX of ***609** our Rules of Practice apply since that rule, by its express terms, applies to rehearings of merit decisions only. Since there was no hearing on the merits, a motion for rehearing was an impossibility. There being no other rules which would limit the filing of successive motions to reconsider, as there are with the motion for [535 N.E.2d 663] rehearing, Dever did not err in so pursuing the matter.

Perhaps more crucially, Dever sought reconsideration for an excellent reason, for our vote on his first motion to reconsider was three-to-three, one member not participating, and thus most inconclusive. Finding nothing specific in the rules, Dever sought clarification of this vote. In this he was unsuccessful, for on two successive occasions this court

entertained additional motions which made the same request. Our vote in each instance was three-to-two, with two justices not participating.

By way of explaining the implications of such vote, one must begin with Section 2(A), Article IV of the Ohio Constitution which states: "A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment." From this provision we have consistently applied our "rule of four," by which a minimum of four votes is needed for the court to act. The situation of deadlock will, therefore, remain when the Chief Justice, acting within his constitutional discretion, determines not to appoint replacements for those not participating. This is entirely reasonable and advances judicial economy when the court considers a number of purely procedural matters, including motions before the court. As to the impact of the vote, obviously a three-to-three vote is insufficient, under our rule of four, to grant a motion to certify the record; it is also insufficient to deny such motion. Consequently, Dever was fully correct in requesting a review of each vote where there were only three votes in a particular direction. Moreover, in Dever's reply brief of January 15, 1987, there were hints of possibly irregular proceedings. For all these reasons, and more, our proceedings in *Joseph v. Dever* lend no support whatsoever to the majority's unprecedented action in the instant case.

As to the concurring opinion, it should be noted that seldom have concurring opinions of this court been crafted entirely with reference to a dissenting opinion. Rather than set forth its own view of the proceedings, such opinion expends its energy against the bulwark of the law as described above.

Initially, the concurring opinion states that the clarification issued by this court was its "*final* decision in this case." Clearly, it was *not*, as is demonstrated by the fact that *no new mandate* issued from this court upon the clarification. As previously mentioned, a mandate issues for all decisions wherein the merits of a case are determined. A "clarification" order is not a "determination" of any matter affecting the parties and has no relationship to the finality of the decision in the case.

Also, the concurring opinion erroneously asserts the unsupported statement that: "A denial of a motion to certify *adjudicates the dispute* between the parties *every bit as much as a decision by this court on the merits*." (Emphasis added.) Great reliance for the fabric of the concurrence is derived from this obvious misstatement of the law. It has always been the law of Ohio that: " * * * [T]he refusal of a motion to certify, even if the same legal question is decisively involved, *does not furnish an adjudication of the question* by this court as an established precedent. ***610** for future cases." (Emphasis added.) *Brewster v. Hill* (1934), 128 Ohio St.343, 353, 190 N.E. 766, 770. See, also, *Keesecker v. G.M. McKelvey Co.* (1943), 141 Ohio St. 162, 25 O.O. 266, 47 N.E.2d 211, at paragraph three of the syllabus, which is directly on point. Moreover, this is a nearly universal rule and is applied with equal force by the Supreme Court of the United States. *United States v. Carver* (1923), 260 U.S. 482, 490, 43 S.Ct. 181, 182, 67 L.Ed. 361. The Rules of Practice make no provision for rehearings of such denials precisely because they are not adjudications upon the merits.

Furthermore, the concurrence hurriedly asserts that "[s]uch motions fall under Section 1, Rule IX, and must be filed within ten days of the decision," citing as authority 23

Ohio Jurisprudence 3d (198), Courts and Judges, Section 426, as interpreting the rule in the asserted fashion. it, of course, candidly admits that "there is a dearth of case authority on the point." The statements [535 N.E.2d 664] relied upon in Ohio Jurisprudence 3d is that "The Supreme Court Rules of Practice provide that a motion for rehearing *of any cause or motion* shall be made within 10 days after the announcement of the decision." (Emphasis added.) It then ascribes this statement to the rule at issue, which, even a cursory glance would demonstrate, has *no* such language. In fact, what the concurrence relies upon is *not* an interpretation of the present rule but is, in fact, a precise quotation of the rule as it formerly existed (see 167 Ohio St., at 1xxiv-1xxv) until its repeal in 1964. See 176 Ohio St., at x1viii. Thus, while we do not address time limitations upon motions to reconsider decisions on motions to certify, our point was made that no rule now exists in such situations.

The concurrence then refers to a panorama of cases in which it alleges that the very act of the majority was done in prior cases. Such cases are obviously inapposite, as *Wisniewski v. Wisniewski* (1985), 20 Ohio St.3d 20, 20 OBR 137, 485 N.E.2d 248, exemplifies. For that case involved not a hearing upon the merits, but the denial on September 11, [1989 SERB 4-32] 1985 of a motion to certify the record. There was no motion for "rehearing" but a motion for reconsideration. The eventual grant of such motion, after this court's decision in *Shearer v. Shearer* (1985), 18 Ohio St.3d 94, 18 OBR 129, 480 N.E.2d 388, was foundational authority for the proceedings in *Joseph v. Dever*
(No. 86-1688) and this because no rule yet limits such.

OAMCO v. Lindley (1986), 24 Ohio St.3d 124, 24 OBR 347, 493 N.E.2d 1345 ("*OAMCO I*"), *OAMCO v.*

Lindley (1986), 27 Ohio St.3d 7, 27 OBR 427, 500 N.E.2d 1379 ("*OAMCO II*"), and *OAMCO v. Lindley* (1987), 29 Ohio St.3d 1, 29 OBR 122, 503 N.E.2d 1388 ("*OAMCO III*"), are completely useless to the inquiry before us. These were three separate opinions, *OAMCO II* and *OAMCO III* coming before this court upon timely motions to rehear, based upon Section 1, Rule IX, *OAMCO I* was reheard in *OAMCO II* and a mandate issued upon its release. The final clarification was also upon a timely motion to rehear the second hearing on the merits. The remainder of the cases cited are similar in character. In footnote 3, a rather unnecessary list of cases is included. These were all rehearings granted upon the ordinary and timely filings of motions to rehear. As such, they are irrelevant.

by reaching out beyond our recognized procedures, the majority has obviously decided to rehear a case which was final and determined.

I therefore strongly dissent from the decision of the majority herein.

FN1. Though there is a dearth of case authority on the point, Ohio Jurisprudence interprets the rule in this fashion and not as espoused by the dissent. 23 Ohio Jurisprudence 3d (1980) 38, Courts and Judges, Section 426.

FN2. That we have denied a number of motions for reconsideration, including several motions for second reconsideration as enumerated in the dissent, is not precedent for an assertion that such motions must be denied. In fact we voted upon (and thus considered) every one of the enumerated determinations. That is the sole precedential value of those determinations. To argue that denial of a motion in an

unrelated case is precedent for denial of the motion here is as illogical as to argue that by denying fifteen straight jurisdictional motions, we somehow set a precedent that all jurisdictional motions are to be denied.

FN3. Case No. 85-865, *In re Estate of James F. White, Sr. et al. v. Ohio Department of Taxation*, 25 Ohio St.3d 355, 496 N.E.2d 888, rehearing denied, Holmes, Douglas and Wright JJ., voting for a rehearing. In this case the ten-day filing limitation on motions for reconsideration was ignored.

Case No. 85-1808, *Rita S. Fuchsman, Admx. Estate of Roy W. Whisler v. Dallas & Mavis Fwd. Co.*, 28 Ohio St.3d 12, 501 N.E.2d 1197, rehearing denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

Case No. 86-229, *Transamerica Insurance Co. et al. v. Charles Richard Taylor, Sr. et al.*, 28 Ohio St.3d 312, 504 N.E.2d 15, rehearing granted, Moyer, C.J., Sweeney, Holmes, Douglas and Wright, JJ., voting for a rehearing.

Case No. 85-1768, *Ohio State Racing Commission v. Racing Guild of Ohio et al.*, 28 Ohio St.3d 317, 28 OBR 386, 503 N.E.2d 1025, rehearing denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

Case No. 86-152, *Nilas, Inc. v. Elvira Kern et al.*, rehearing granted, Moyer, C.J., Holmes, Douglas and Wright, JJ., voting for a rehearing. The original Supreme Court decision was subsequently reversed on the merits. See (1986). 28 Ohio St.3d 165, 28 OBR ***610** 257, 502 N.E.2d 1025, and (1987), 31 Ohio St.3d 163, 31 OBR 366, 509 N.E.2d 1267.

City of Rocky River v.
State Employment Relations Board
41 Ohio St.3d 602, 535 N.E.2d 657

Case No. 86-1688, *Ronald G. Joseph et al. v. Michael L. Dever et al.*, rehearing denied, Moyer, C.J., Holmes and Douglas, JJ., voting for a rehearing.

Case Nos. 86-525, 86-270, *Office of Consumers' Counsel v. Public Utilities Commission of Ohio*, rehearing allowed, Moyer, C.J., Holmes, Douglas and Wright, JJ., voting for a rehearing. The original Supreme Court decisions were subsequently reversed (case No. 86-525), and reversed in part (case No. 86-270) on the merits. See (1987), 32 Ohio St.3d 263, 513 N.E.2d 243.

Case No. 86-784, *New Energy Company of Indiana v. Joanne Limbach, Tax Commissioner, et al.*, rehearing granted, Moyer, C.J., Holmes, Douglas and Wright, JJ., voting for a rehearing. The original Supreme Court decision was subsequently reversed on the merits. See (1987), 32 Ohio St.3d 206, 513 N.E.2d 258. Interestingly, this case went on to the United States Supreme Court which found by a vote of nine to zero that the original Ohio Supreme Court decision was the correct one. See (1988), 486 U.S. 269, 108 S.Ct. 1803, 100 L.Ed.2d 302.

Case No. 86-205, *Ed Stinn Chevrolet, Inc. v. National City Bank*, rehearing allowed, Moyer, C.J., Sweeney, Holmes, Douglas and Wright, JJ., voting for a rehearing. See (1986), 28 Ohio St.3d 221, 28 OBR 305, 503 N.E.2d 524, and (1987), 31 Ohio St.3d 150, 31 OBR 316, 509 N.E.2d 945.

Case No. 85-788, *Barbara Stubbs v. W. Donald Webb, M.D., et al.*, 28 Ohio St.3d 300, 503 N.E.2d 745, rehearing denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

City of Rocky River v.
State Employment Relations Board
41 Ohio St.3d 602, 535 N.E.2d 657

Case No. 85-838, *Carolyn A. Byrne, a Minor, et al. v. Pediatric Assoc., Inc. et al.*, 28 Ohio St.3d 300, 503 N.E.2d 740, rehearing denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

Case No. 85-1039, *Deanna R. Wainstein v. University Hospital of Cleveland et al.*, 28 Ohio St.3d 270, 503 N.E.2d 717, rehearing, denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

Case No. 85-1249, *Trena D. Longshore v. Rodney B. Hurl, M.D., et al.*, 28 Ohio St.3d 305, 503 N.E.2d 697 rehearing denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

Case No. 85-1461, *Richard Scott Boles et al. v. Dr. Victor George Lenzo et al.*, 28 Ohio St.3d 308, 503 N.E.2d 743, rehearing denied, Moyer, C.J., Holmes and Wright, JJ., voting for a rehearing.

***610_** FN4. I make no assertion that any of the votes in those cases was unlawful or improper. I allude to them only to illustrate the inconsistency in the position which lies at the heart of one of the dissents.

APPENDIX T

Drs. Markowitz, Rozenberg & Associates, Inc.

Stuart L. Markowitz, MD
David M. Rosenberg, MD
Eric J.B. Shapiro, MD
Carl E. Orringer, MD
Richard L. Stein, MD
Paula J. Dauley, MD
Janice A. Granieri, MD

UniversityHospitals Health System Primary Care Phsyician Practices

September 11, 1997

Mr. Patrick J. Perotti
c/o Dworken & Bernstein Company, L.P.A.
153 East Erie Street
Third Floor
Painesville, OH 44077

RE: JAMES KULCH

Dear Mr. Perotti:

I had the opportunity to review the records that you sent me regarding the case of Mr. James Kulch. I have reviewed the discharge summary from his hospitalization at Geauga Hospital on 8/18/90, at which time he was admitted with chest pains and was found to have an acute inferior wall myocardial infarction. Coronary angiography at that time demonstrated total occlusion of the right coronary artery with 40% stenosis in the left anterior descending and in the left

circumflex system. He was treated medically at that time.

I then received the records from his admission to Lutheran Medical Center in late December of 1991 when he was admitted with chest pain and suffered an anterior myocardial infarction. Cardiac catheterization at that time demonstrated progression in his preexisting disease, as the left anterior descending artery was now noted to be 99% narrowed proximal to the first septal perforator and first diagonal branch and there was an 85-90% stenosis in a hug marginal branch of a nondominant left circumflex. The patient was then referred to Dr. Santoscoy at Meridia Huron Hospital for coronary bypass surgery.

After reviewing the information that you sent to me regarding the extremely high level of job related stress that Mr. Kulch was under between September of 1990 to the time of his termination from employment on October 17, 1991, it is my opinion that the job activities, firing and financial fear and stress, superimposed upon his preexisting heart condition, was more likely than not a causal factor in the patient's subsequent myocardial infarction in December of 1991.

Sincerely yours,

/s/_____
Carl E. Orringer, M.D.

CEO/taa